

# Cour d'Appel

Montréal

En appel de la décision rendue le 26 juillet 1991 par  
l'honorable juge [REDACTED] re,  
distri

Nos:

LE PROCUREUR GÉNÉRAL DU CANADA  
**APPELANT-Intimé**

c.

RJR-MacDONALD INC.  
**INTIMÉE-Requérante**

-et-

LE PROCUREUR GÉNÉRAL DU CANADA  
**APPELANT-Intimé**

c.

IMPERIAL TOBACCO LTD  
**INTIMÉE-Requérante**

-et-

LE PROCUREUR GÉNÉRAL DU QUÉBEC  
**MIS EN CAUSE-Mis en cause**

D O S S I E R            C O N J O I N T  
Volume XL: pages 7575 à 7824  
(Dépositions)

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PROVINCE DE QUÉBEC  
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SOUS LA PRÉSIDENCE DE L'HONORABLE JUGE JEAN-JUDE CHABOT, J.C.S.

No: 500-05-009755-883

RJR-MACDONALD INC.

Requérante

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA

Intimé

No: 500-05-009760-883

IMPERIAL TOBACCO LIMITÉE

Requérante

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA

Intimé

14 mars 1990 - Vol. 46

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In the year of Our Lord nineteen hundred and ninety (1990),  
on this fourteenth (14th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

5 Me COLIN K. IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et  
Georges Thibaudeau.

Me SIMON V. POTTER:

Et pour Imperial, Simon Potter.

10 Me PAUL EVRAIRE:

Pour le Procureur général du Canada, maîtres Baker,  
Joyal, Tremblay et Evraire.

Me IRVING:

15 My Lord, before we begin this morning, we received a  
copy yesterday -- I'm sorry, Monday -- of a  
supplementary report by Dr. Jeffrey Harris, the  
long-promised revision to the original report and I have  
an application to make in respect of that. Do you have  
a copy of it in front of you, My Lord?

20 THE COURT:

In my office.

Me IRVING:

Let me hand up a copy and I'm going to hand up with it  
an additional sheet which I'll explain in a moment.

25

Me BAKER:

Have you got an extra copy of the additional sheet?

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Me IRVING:

5 Sure. The supplementary report is in two (2) parts and what I have to say relates only to the first part, which you will see in the index as being a cross-country analysis of advertising restrictions and trends in cigarette consumption. The second part of the report is an analysis of data supplied by Imperial Tobacco.

10 You will recall, My Lord, that at the time the expert reports were to be prepared, which was last summer, Dr. Harris did not have certain data which Imperial Tobacco was to provide and which is generally referred to as the C.M.A. material. As a result, it was understood that his report would be supplemented when he had the opportunity of reviewing the C.M.A. material.

15 The first part, the cross-country analysis, is entirely new and as you will see from just glancing at it, what he has done is to take data from the Toxic Substances Board report, which is of course not before the Court, and particularly from one appendix to that report which is the sheet which I've handed up to the Court. He's taken the data on that appendix and has carried out a number of mathematical analyses, using  
20 mathematical modeling techniques, to support conclusions  
25

on the effect of advertising on total consumption and the effect of advertising bans on restricting consumption.

5 My Lord, it would be open to us, in my submission, to ask to have that part of the report struck altogether. The data which forms the basis of it was available to Dr. Harris last July, if not before. There is absolutely no reason why we have waited eight (8) or  
10 nine (9) months to have that part of the report given to us.

Your Lordship's original order was that expert reports would effectively be exchanged -- ours were to be provided one (1) week before those of the Attorney General -- so that it was quite clear from the beginning  
15 that expert reports on the Attorney General's side were not intended to be replies to the expert reports of the applicant and, of course, the burden of proof lies on the Attorney General on all factual issues in the case.

I do not apply to have it struck out for the simple  
20 and practical reason that to do so would, on past performance, inevitably result in an application for leave to appeal and further delays in the case.

25 However, Dr. Harris is due to testify two (2) weeks last Monday, and the result is that using data which he's had in his hands for over nine (9) months, he has



provided a report which is incomprehensible to the layman because only an expert can understand the mathematical model.

5           Nine (9) working days before his appearance in Court -- I pointed this out to my friend, Mr. Baker, on Monday and said that I would apply to have Dr. Harris' appearance postponed for at least two (2) additional weeks, so that we would have the time to consult with our own experts in order to be in a position to properly  
10       assess this report and to cross-examine on it and Mr. Baker refused to agree to any adjournment of Dr. Harris's appearance, which is why I'm now on my feet. I have, of course, provided copies of the supplementary report to the two (2) experts who will be advising us.  
15       One (1) of them is overseas, one (1) of them can see us on Monday of next week at the earliest. It is patently unreasonable to expect anyone on this side to deal with a report of this nature on two (2) weeks' notice and it is -- is unfair. There is absolutely no reason why this  
20       should not have been in our hands months ago. Dr. Harris had the data and we could have had it. This is abusive, and nothing short of abusive, to attempt to put in this kind of new report two (2) weeks before the appearance of the witness, knowing perfectly well, in my  
25       submission, that it's improper to put it in at all

because it simply changes the expert's report altogether but also knowing that it's us on this side who are suffering the effects of this law and want to get this case decided.

5           My Lord, my application is this, that the Court in the exercise of its discretion and power to control the process of -- of the Court should order that the appearance of Dr. Harris should be postponed for two (2) weeks so that he appears four (4) weeks last Monday and  
10           not two (2), which will give us adequate time to prepare cross-examination.

THE COURT:

Basically it's what -- what -- in practice, what day would that be?

15       Me IRVING:

He was to appear on the twenty-sixth (26th) of March.

Me POTTER:

Which would make it the seventh (7th) of May, My Lord.

Me IRVING:

20           Well, just a moment, then we'll move it to three (3).

Me POTTER:

Sorry.

Me IRVING:

25           No, no, if it's two (2) weeks from now, we're in April, it would be the tenth (10th)...

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Me POTTER:

April, tenth (10th)...

Me IRVING:

Monday, the tenth (10th) of April. I'm sorry, Monday  
5 the ninth (9th) of April. I was reading the calendar  
wrong, it would push it to the ninth (9th) of April.

Now, my friend will say that he wishes to begin  
with Dr. Harris on the marketing case and that he has  
control over his own case but, My Lord -- and that would  
10 ordinarily be the case -- but where this kind of game  
has been played and that fresh report is filed just two  
(2) weeks ahead of time filled with technical material  
which we have to have analyzed outside, I submit  
respectfully that my friend has lost that right and that  
15 the Court should order that that should be the date for  
Dr. Harris. In the meantime, the other witnesses should  
be heard so that we don't lose our time.

THE COURT:

Would you have a problem if the witness be heard in  
20 chief and cross-examination postponed?

Me IRVING:

My Lord, well, it's just a very inconvenient way to do  
things. It's difficult for the Court to -- to break up  
examination in chief and cross-examination over two (2)  
25 weeks, so that it seems to me, in the interests of

everybody, the witness should give his evidence at one time and be cross-examined right away. However if...

THE COURT:

Well, I'm asking you?

5 Me IRVING:

...if that -- if that is the only alternative, that certainly is much better than -- than nothing, but I would suggest that from the Court's point of view that would not be very convenient because then Your Lordship is going to hear Dr. Harris on the Monday that the other witness is intervening and then the cross-examination takes place weeks after. I would -- I would suggest that that would not assist the Court. It would be much better to simply have Dr. Harris heard in chief and in cross-examination at one time.

15 Me POTTER:

My Lord, since half of that report deals with the C.M.A. which comes from my client, Imperial, I should perhaps stand -- not to tell you that I cannot be ready to cross-examine on that half of the supplementary report in two (2) weeks time, but to tell you that I can't promise to be ready.

My client is unable to tell me today whether I -- whether they will have had a chance in the two (2) weeks to redo the work which Mr. Harris has now had six (6) or

seven (7) months to do with our computer tapes which we gave to him. So I cannot promise to be ready in two (2) weeks to cross-examine him.

Your suggestion of having the in chief in two (2) weeks and the cross-examination sometime later would be acceptable to Imperial.

THE COURT:

Maître Baker?

Me BAKER:

My Lord, I would like to first begin by addressing the remarks of Mr. Potter. He says that he can't promise to be ready for cross-examination two (2) weeks after he had first seen -- or his clients had first seen the supplementary report.

The existence of the C.M.A. data base was not disclosed to the Attorney General until June of nineteen eighty-nine (1989). I think the history of this is extremely important in spite of the fact that an extremely detailed subpoena was sent to Imperial Tobacco by the Attorney General in November of nineteen eighty-eight (1988).

It came out, I believe, inadvertently, by Mr. Donald Brown in the discovery. We immediately asked Mr. Potter to disclose all of the information contained in the tapes to us. We played a game for several weeks,



negotiations broke down and, as you may recall, I telephoned you very early in July, nineteen eighty-nine (1989), asking you for a hearing date, because we had a problem with documentation between me and Mr. Potter.

5           You gave us a hearing date, and the day before the hearing Imperial decided to disclose -- to simply hand over the tapes to us. This was in the month of July.

          You might note from the original report of Dr. Harris, I don't know if you have it in front of you, 10           that he was only able to start working on the tapes, I think approximately the twentieth (20th) of July.

          In the few-week period -- yes, it's at page seven (7) of the report, my analysis of the C.M.A. computer tapes began on July twenty (20), nineteen eighty-nine 15           (1989). He developed an entire report from those C.M.A. tapes in a two and a half ( $2\frac{1}{2}$ ) week period. These tapes are the property of Imperial Tobacco. The data in them is the property of Imperial Tobacco. They have massaged those tapes, they have used those tapes, they have told 20           us and they have told you in open Court that these tapes are the primary reason for their pre-eminence in the Canadian tobacco market. They know those tapes upside down, side backwards and forwards.

          For Mr. Potter to come in here this morning and say 25           that some additional data from the C.M.A. tapes

confronts them with such cataclysmic problems that they can't promise to cross-examine in two (2) weeks, strikes me as almost amusing, My Lord.

5 First they hamstring us, then we get the data, then we further use the data and he's got two (2) weeks to prepare a cross-examination and he says he doesn't have the time. I cannot accept that, My Lord.

10 They put Harris to the test and Harris achieved a considerable accomplishment in a two and a half ( $2\frac{1}{2}$ ) week period of time. They who are the masters of their tapes and know the programs, surely can be responsive to whatever Harris has got in there in a five (5) or six (6) page additional report reflective of the C.M.A. data.

15 Now, I'll move to Mr. Irving. He says this morning that it's entirely new, as though what Dr. Harris has put in his report is a surprise. I refer you to Volume XXVIII of the transcript, November twenty-three (23), nineteen eighty-nine (1989), and I'd like to read you  
20 the words of Mr. Irving.

THE COURT:

What page?

Me BAKER:

25 Quarante-cinq dix (4510), Votre Seigneurie. Beginning in the middle, of course, now my friend is correct.

Towards the bottom of that paragraph, he says he wants somebody to be cross-examined on the accuracy of the facts in the New Zealand report and he says:

"Then no doubt they can produce it. But at that point I will have somebody in front of me who I can question on the subject and at the moment I do not."

Now, I would like to show you -- do we have -- do you have a copy of the Harris report in front of you, My Lord, the original one.

THE COURT:

Not the original. I didn't expect to deal with this this morning.

Me BAKER:

Well.

THE COURT:

I have the Kozlowski's and I have everything, but not...

Me BAKER:

Page twenty-one (21), My Lord.

Me IRVING:

The pages aren't numbered.

Me THIBAudeau:

What is page twenty-one (21)?

Me IRVING:

The copy we were given has not got any numbered pages.

THE COURT:

Well, it's cross-national comparisons.

Me BAKER:

Here is it.

5 THE COURT:

View number two (2).

Me BAKER:

10 The conclusions he reaches on page twenty-one (21) in  
respect of the international data is that tobacco bans  
appear to have the effect of diminishing consumption.

THE COURT:

Where are you?

Me BAKER:

Page twenty-one (21), My Lord.

15 Me IRVING:

Where is that?

Me BAKER:

Do you have page twenty-one (21), My Lord?

THE COURT:

20 Yes. But I'm trying to find where you're reading from.

Me IRVING:

It's cross-national comparisons?

Me BAKER:

M'hm. In the fifth line.

25 "Slower declines in tobacco consumption per

adult were observed in countries with  
incomplete bans. In countries where tobacco  
promotion has been virtually unrestricted in  
all media, consumption was found to have  
increased. Other concurrent public policies  
..."

-- in the following paragraph, My Lord.

"...appear to have affected consumers'  
knowledge of the health risks of smoking and  
the overall social acceptability of smoking.  
Governments have enacted large tax increases  
in some countries."

The next page:

"Nevertheless, it is reasonable that such bans  
act synergistically with taxation and with  
other public policies aimed at reducing  
smoking."

Now, at page thirteen (13) of the amended report he  
tells you...

THE COURT:

Well, the supplemental report. Supplementary report.

Me BAKER:

Starting at the top, My Lord. He says what the report  
does not pretend to be, and he says in the third  
sentence:



"Still the evidence given here from  
cross-country comparisons is consistent with  
the hypothesis that tobacco use declines more  
rapidly in countries with restrictions on  
tobacco advertising and promotion."

He has analyzed the basic data in the New Zealand  
report, and this is the conclusion he reaches. That  
thought is not inconsistent with the page I referred you  
to or the thoughts on page twenty-one (21) and page  
twenty-two (22) of the original report.

Now, my friend says Harris has had this data or  
their original report for nine (9) months. That  
expert's reports are not intended to be responsive to  
other's expert's reports, because they were originally  
intended to be exchanged, and you know what happened, My  
Lord, they filed their report on the first (1st) of  
August, nineteen eighty-nine (1989), the Attorney  
General filed it's report on the seventh (7th) of  
August.

Of course, there was no way that we could have  
known that Mr. Waterson was going to write a report  
which, in part, dealt with cross-national comparisons  
with his charts and that he would say that ad bans don't  
work. There was no way on God's earth that we could  
have known that.

5           So what happened? Mr. Waterson came to Court and testified. And using the same tables that appeared in the New Zealand report, as you will recall his testimony that he didn't prepare the tables himself. He said on the first (1st) of November, nineteen eighty-nine (1989), in Volume XVII of the transcript.

THE COURT:

I'm sorry?

Me BAKER:

10           Volume XVII.

THE COURT:

Page?

Me BAKER:

15           Vingt-cinq soixante-neuf (2569). Talking about the New Zealand Toxic Substances Board Report. I have...

Me IRVING:

What page? Sorry.

Me BAKER:

Twenty-five sixty-nine (2569).

20           Me IRVING:

Sixty-nine (69)?

Me BAKER:

25           M'hm. I have already stated my opinion of this report. I believe that the people were either incompetent or trying deliberately or inadvertently to produce data --

I'm sorry, they either did inadvertently or deliberately produce misleading data in many parts of the report.

Now, as you know, Mr. Waterson was cross-examined quite extensively in connection with the data and the data base he used, and his allegation that the people who produced the Toxic Substance Board report either were deliberately misleading or didn't know what they were doing.

That became and will become a very important issue in this case, because the Toxic Substance Board comes to conclusions. Mr. Waterson produced an expert witness report, forty-five (45) paragraphs of which, as you know, were found in the answer to the New Zealand Toxic Substance Board report produced by the Australian Tobacco Institute.

What did my friend think was going to happen or what does my friend think, as a matter of law, should happen? That an expert's report gets filed on the first (1st) of August, there is no time to be responsive to it. That one of his witnesses comes in three (3) or four (4) months later, testifies on his report, uses charts right out of the Toxic Substances Board report and that one of the Crown's experts isn't supposed to be responsive to that kind of testimony?

I don't know of any principle of law that would

prevent us from doing that.

Now, my friend has said that he is not making a formal motion to strike the report or preclude its admission simply because, on past performance, we would  
5 take the decision to appeal if his application were granted. I make no comment on that, My Lord, simply to say that for the moment then, we can ignore it.

So his entire discussion really focused on what was fair; and because we have, as I think he put it, this  
10 kind of game has been played, we have now lost the right to control which witnesses are going in in which order.

Now, Mr. Potter has said that he can't make any promises. Well, I would urge the Court to urge Mr.  
Potter to have the Imperial Tobacco computers work  
15 rapidly, if necessary. Doctor Harris is scheduled to testify on the twenty-sixth (26th) of March. Dr. Harris' examination in chief should take two (2), possibly three (3) days.

Of the two (2) applicants in this case, in respect  
20 of their ability to cross-examine on the supplementary report, I have much less sympathy for the Imperial Tobacco position because I believe, given the background of the C.M.A. data, and whose data it is that's being used in the supplementary report of Harris, they should  
25 be ready.

5           So I would urge you, My Lord, to do the following:  
allow Dr. Harris to proceed on the twenty-sixth (26th)  
of March, let Mr. Potter begin the cross-examination of  
Dr. Harris, because you will remember, My Lord, from  
10           having looked, perhaps sometime ago, at the original  
Harris report, it is replete with data, comments and  
observations and conclusions as a consequence of the  
Imperial Tobacco data. That may well take Mr. Potter  
two (2), three (3) days. We don't know. At the end of  
15           that week, Mr. Irving will have had the three (3) weeks  
necessary as he told us a few weeks ago. He's now  
changed it to four (4). He is not caught completely  
unawares. He has known for a very long time this was  
going to be coming. RJR-Macdonald is not some poor  
20           defenseless applicant, My Lord. They're not going to  
have to go to the yellow pages and find a mathematician.  
This is -- this a "filiale" of one (1) of the most  
powerful corporations in the world. They've got foreign  
counsel in the room. I'm assuming they have access to  
25           the finest economists and statisticians all over the  
globe. Harris has not stood the world on its head with  
his new report. Surely to goodness three (3) weeks is  
more than sufficient time for my friend, Mr. Irving, and  
the people who are behind him who will be advising him  
to commence a cross-examination -- and even if that were



not a hundred percent (100%) true, there was a  
forty-five (45) page report originally filed.

Is my friend going to contend that he doesn't have  
enough work to do in cross-examination in respect of the  
original conclusions that were found even ignoring the  
transnational data, because if my friend were to make  
that assertion, I would simply say I find it  
inconceivable that could be true or accurate.

So, there is no reason to switch the order, there  
is no reason to postpone Harris. He can go forward, he  
can be cross-examined first by Mr. Potter and then  
admirably, I'm sure, cross-examined by Mr. Irving all in  
good time. Now, I'd like to end with one (1) note.  
It's very easy for Mr. Irving to say "the game that is  
being played." We were not dealing with some junior  
academician in Dr. Jeffrey Harris. He's a man -- I know  
this is not the Court's problem and I know this is not  
Mr. Irving's problem, but we are dealing with a very  
senior academic who, as you know from having perhaps  
looked at his report or his curriculum vitae, is both a  
physician and an economist. The man is inordinately and  
extraordinarily busy. I have tried as hard as I  
possibly can to have gotten the report to this Court on  
a more timely basis. I bled to get that report in as  
early as possible, My Lord. There is no game being

played. It's very easy for Mr. Irving to throw the word out.

That having been said, I don't -- I don't, I submit, believe that the Attorney General should be punished and be manipulated by Mr. Irving to say well, they've played a game, naughty boys, they should now be punished, defer Harris by two (2) weeks and put the other witnesses in out of order.

THE COURT:

No, but if we proceeded on in chief, would Dr. Harris then postpone the cross-examination, what's your problem? What's your prejudice? What's your punishment?

Me BAKER:

I share the observation of my friend, Mr. Potter, and I don't say that as a simple matter of convenience, My Lord. What happens -- what Harris does and will do in chief and in the reports themselves is very, very complicated. It's not easy to follow. He is a mathematician and an economist as you know.

I don't believe that it serves any of our purposes by starting an examination and having an extended delay and then begin the cross-examination. If you're asking me what my prejudice is by giving them the extra time in between, that is not -- that's not the issue I speak to.

Truly, if for some reason or other we had a four (4) month delay for goodness knows what reason and Harris couldn't start, I don't really care. The object of the exercise here is not to trap -- catch my friends by surprise and make it more difficult for them to cross-examine. That I give you my personal assurance on, but I believe that Harris should start and to the extent that he can be cross-examined, he should be cross-examined.

Certainly my friend, Mr. Potter, has much less of a problem than Mr. Irving does but I seriously believe that with the three (3) weeks that he will have if he cross-examines second, he will have achieved enough time or his people will have enough time to have achieved enough information to give him for an appropriate cross-examination.

Now, if my friend is going to rise and say it's not for me to suggest which of the two (2) should cross-examine first, I won't use the expression that I used many times in the fall for which...

THE COURT:

That means...

Me BAKER:

...you threatened me with my life.

THE COURT:

It's been a long time, you may.

Me BAKER:

5 It's been a long time but I've made a New Year's  
resolution that you wouldn't hear it uttered out of my  
mouth, My Lord, but let us not apply a double standard;  
and the double standard out of Mr. Irving's mouth is  
that he will now tell us which witness goes in which  
order, and that is patently unacceptable -- unacceptable  
10 to the Attorney General.

THE COURT:

Do you have something to add?

Me IRVING:

15 My Lord, only -- well, two (2) things. Let me correct  
the most egregious mistake that my friend has made,  
which is that Mr. Waterson has used the data from the  
Toxic Substances Board report, which is completely  
untrue and my friend ought to know it if he doesn't.  
The data which is now incorporated into Dr. Harris'  
20 report is all taken from this Appendix 3 and you've only  
to look at the sources to see they're entirely different  
sources and they are entirely different numbers from  
those which are already before the Court. I'm not going  
to attempt to reply to the rest of it.

25 May I suggest this My Lord. There should be only

one (1) period of cross-examination for Dr. Harris. We, on this side, should, of course, be free to decide which of us will begin. If the suggestion the Court made earlier would be acceptable, Dr. Harris can be heard in chief and then we'll go on to other witnesses to give us time to prepare the cross-examination. That would be quite satisfactory to us and we will decide between us who will cross-examine first and, of course, we will coordinate the cross-examination so we don't both cover the same -- the same area.

But my friend has said nothing in reply to what I said originally. The problem is simply to get experts to look at it, to explain to the lawyers, which is not easy, the mathematical processes that were followed, because I must understand that process in order to ask questions. That is not easy, particularly for me, and this cannot be done when I'm sitting here in Court listening to Mr. Potter cross-examine on the C.M.A. tapes.

My Lord, I would simply ask then, that he be heard the twenty-sixth (26th), if that's what my friend wants to do and that we should then get two (2) weeks to do the cross-examination. That will ensure that somewhere in the two (2) weeks, we have enough time to meet with our experts -- as I say, one (1) is overseas -- and be

ready to cross-examine.

Also, may I say, there's absolutely no reason why Dr. Harris should be testifying for three (3) or four (4) days.

5 THE COURT:

Do you have something to add?

Me POTTER:

No, My Lord.

THE COURT:

10 I will not order a postponement for a witness from the Crown, it's their privilege to choose the way they put their witness.

15 However, I will give you all the time you need to cross-examine and prepare for cross-examination. So, therefore, I -- you've asked till the ninth (9th) of April. So, if you need to the ninth (9th) of April, we'll grant you that delay to the ninth (9th) of April.

Me IRVING:

Thank you, My Lord.

20 THE COURT:

Proceed with Dr. Kozlowski.



In the year of Our Lord nineteen hundred and ninety (1990),  
on this fourteenth (14th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

5 LYNN T. KOZLOWSKI, forty-two (42) years of age, residing at  
[DELETED]

WHO, having made a solemn declaration, doth depose and say as  
follows:

10 THE COURT:

Before you start, I want to thank you for coming back.  
We have heard and we're sorry about what happened to  
your mother and I appreciate the effort that you have  
shown.

15 A- Thank you very much. I also apologize for that.

Q- No, you don't have to apologize.

CROSS-EXAMINATION BY Me COLIN K. IRVING (CONTD),

On behalf of Petitioner, RJR-Macdonald Inc.:

20 Q- Dr. Kozlowski, I share the Court's view. I'm sorry  
about what happened and...

A- Thank you.

Q- ... I appreciate your being here this week. Doctor, it  
would perhaps be helpful if my friends would give you  
25 the transcript, Volume XLI, so you see where we left

off. We had been discussing, you may recall, the question of difficulty in giving up and whether somebody who simply does give up is an addict or not and I just point out to you, at page sixty-four eighty-seven (6487), just below line twenty (20), I had asked a question:

"You do know that at the point they do give up, they're not addicted, in my example, don't you?"

And you said yes. And then over the page, we were again discussing this question of difficulty and I asked you, just below line ten (10):

"But you have no idea what the difficulty is, do you, until the person actually tries?"

And you say:

"I think that's fair to say, yes."

And then, on the next page, sixty-four eighty-nine (6489), the question just below line five (5) is:

"And you don't know, do you, I mean for those who don't go to clinics, how difficult it was for them to give it up?"

And you say:

"No, you don't know that from the clinical data certainly."

And then we got into a discussion of how many people go

to clinics, and just as we concluded for the day I was asking you -- and you'll see this at page sixty-four ninety (6490), just at the bottom of the page, just below line twenty (20):

5           "Would one of the ways of measuring the difficulty be to find out how many attempts it took the successful quitters to quit?"

And your answer is:

10           "Well, it would give you information relevant to that, yes, and it would be interesting."

So that's where we had left off and I'd like to follow with that and ask you, Doctor, to look at government Exhibit AG-182, which is entitled "Smoking and Health - A National Status Report".

15 Me EVRAIRE:

Go ahead, I'll have to follow with the copy in front of you.

Me IRVING:

20 Q- Let me show it to you, Doctor. It's a report to Congress entitled "Smoking and Health - A National Status Report", Second Edition, and that's from the U.S. Department of Health and Human Services, and there is a foreword by Louis Sullivan, table of contents, and there are some data in Tables 9 and 11 that I'd like to look at with you, but let me ask you first whether you've

25

seen this document before.

A- No, I've not.

Q- Take a minute, if you would.

A- You'd like me to look at Tables 10 and 11 or...

5 Q- Yes, I'd like you -- well, I'll show you what I'd like  
you to look at. At page nineteen (19), there is a  
section entitled "Quit Attempts of Former Smokers". I'd  
like you to read that.

A- In particular the last paragraph there? Is that...

10 Q- No.

A- The whole?

Q- That whole section.

A- Okay.

15 Q- Have you read it? Now, that section indicates, Doctor,  
that -- and I'm reading now from it:

"The majority of former smokers, 72.2%, had  
made 1 or 2, 1 to 2 attempts before quitting,  
21.2% tried 3 to 5 times and 8.6% tried 6 or  
more times."

20 And at the bottom of the paragraph, it indicates that:

"The major difference between 1975 and 1986 is  
that a greater proportion of former smokers  
indicated they were successful on their first  
or second attempt to quit in 1986, 70.2%, and  
25 in 1975, 59.0%."

Let me ask you, Doctor, had you looked at the nineteen seventy-five (1975) data?

A- Um... not that I recall with reference to this particular question. I'm not sure which data set they're talking about in reference to nineteen seventy-five (1975).

Q- Well now, if in fact, as reported in that exhibit, seventy percent (70%) indicated in nineteen eighty-six (1986) that they had succeeded in quitting on their first or second attempt, whereas ten (10) years earlier only fifty-nine percent (59%) did that, would you not agree that that is a substantial statistical change?

A- Yes, I would think it's a substantial statistical change.

Q- Apart from the fact that by nineteen eighty-six (1986) general average levels of tar and nicotine in cigarettes would have been lower than nineteen seventy-five (1975), is there any other change in cigarettes in the period that you can think of that might account for that change?

Me EVRAIRE:

Well, excuse me. My friend says -- is asking the witness what would account for the change. My friend's earlier question was a hypothesis, as I gather, since the witness was not familiar with the data. My friend

put his hypothesis: "If you accept those as accurate".  
Now my friend is putting the question as a fact. I  
think my friend should continue with the hypothesis  
because my friend has not, through this witness, proved  
5 the matters in the paragraph that he's asked the witness  
to read.

Me IRVING:

I'm referring the witness to a government exhibit, My  
Lord.

10 Me EVRAIRE:

A government exhibit?

Me IRVING:

Yes, your exhibit, Mr. Evraire.

Me EVRAIRE:

15 Excuse me. This is nevertheless information that this  
witness has said he's not seen before. That doesn't  
satisfy the test, it's my submission.

THE COURT:

Be that as it may, what's your point?

20 Me EVRAIRE:

My point is my friend is now stating the information in  
this paragraph at page nineteen (19) as a fact.

THE COURT:

25 No, he's asked if in fact it's correct. The witness  
said that, well, that would have been a substantial

statistical change.

Me EVRAIRE:

Right. He's now asking this...

THE COURT:

5       The second question is whether or not there have been  
changes in cigarettes. That doesn't change the previous  
answer.

Me EVRAIRE:

10       No, it doesn't change the previous answer but now my  
friend is putting it as a fact. What I'm underscoring  
is the fact that my friend must continue with this as a  
hypothetical question to the witness.

THE COURT:

We've noted your intervention.

15       Me EVRAIRE:

Thank you.

A-     Could I have the question again, please?

Me IRVING:

20       Q-     I was asking, Doctor, whether in the period between  
nineteen seventy-five (1975) and nineteen eighty-six  
(1986) there was any change in the composition of  
cigarettes, apart from lower average tar and nicotine  
levels, which would account for that reported difference  
in success in quitting, that you can think of?

25       A-     I don't know of anything in the composition of



cigarettes that would account for that change.

Q- Now, we have been discussing the question of how many --  
how many Americans have given up smoking in the last two  
(2) decades, Doctor, and I put a figure to you of forty  
(40) to fifty million (50,000,000), which I think you  
said you would accept.

Do you know how many Canadians have given up in the  
same period?

A- I don't know that number.

Q- We discussed in respect of the United States the number  
of those successful quitters who would have attended  
clinics, such as the Ontario Lung Clinics or others, and  
I had put it to you that it was about five percent (5%).  
Have you any idea what percentage of Canadians who  
successfully quit have required the services of any  
outside agencies to do so?

A- I would think it's a small percentage.

Q- Would you accept that it's about the same as it was in  
the United States, about five percent (5%)?

A- I would think it's generally comparable.

Q- M'hm. And would you accept that in respect of  
Canadians, as well as Americans, the ones who do go to  
clinics, as opposed to those who simply quit on their  
own, are the ones who are most likely to be experiencing  
serious problems?

7610

A- The problems would be very diverse, but I think, in general, that would be true.

Q- M'hm. I'd like to come back now to the question of definition in the scientific sense rather than the popular sense, Doctor.

5

Let me show you Exhibit RJR-144, which we've looked at before, which is from the Addiction and Research Foundation's own textbook. I'd ask you to look at the definition of drug dependence, which is at page thirty (30), and tell me whether you agree with it -- whether you agree that that is an accurate definition?

10

A- It's correct that those are commonly used definitions -- commonly accepted definitions of drug dependence.

Q- M'hm. And you accept them yourself, do you?

15

A- The elements that they talk about, I do accept. The way I describe addiction relates to those two (2) but it, as I think you appreciate, uses somewhat different terms, but I think it's speaking of the same basic phenomenon.

Q- Well, I'm looking now at the drug dependence definition and the first of the "commonly accepted types" is described as:

20

"Physical dependence is a state in which the body has adjusted to the presence of a drug so that when the drug is withdrawn there are clear physical withdrawal symptoms, usually

25

involving discomfort and pain."

So that is one (1) of the two (2) tests of drug dependence, is it: physical dependence?

A- Well, that's...

5 Q- That's one kind?

A- ...one kind, yes.

Q- Yes. And the other kind is psychological dependence?

A- That's correct.

10 Q- I see. And many scientists, would they not, Doctor, would accept what I see here on page thirty (30) as being an accurate and complete definition of drug dependence?

A- I think that's correct.

15 Q- And the Addiction Research Foundation of Toronto indeed does, because this is taken from its own textbook, isn't it?

20 A- Well, this -- I think one needs to distinguish between the official view of the Addiction Research Foundation and views of its scientists that, in general, the foundation has kind of elaborate procedures with committees and so on to come up with official foundation positions. This, I think, is a representative view of what senior scientists there would think, but it's -- my understanding of this textbook is that it's not meant to represent the official view of the Addiction Research

25

Foundation.

5 Q- Let me put it more generally, Doctor, isn't it a fact  
that within your field scientists of the highest  
reputation differ among each other in agreeing on -- I'm  
sorry -- in their definition of a word such as addiction  
and that we can find, in looking through the literature,  
indeed looking through your report, different  
definitions, all of which would attract the approval of  
some segments of the scientific community and all of  
10 which would be open to some objection by some scientists  
of reputation; is that not true?

A- I think there are terminological disputes. I think  
there is remarkable consistency in the basic underlying  
phenomenon that these definitions are being applied to.  
15 I think there are quibbles, as I would view them, about  
the way one talks about the phenomenon.

Q- Now, you said earlier in testifying here that the  
difference between dependence and addiction is just a  
terminological quibble? Am I quoting you accurately?

20 A- Yes. I think in general...

Q- So that you would say then that the definition of drug  
dependence, which you've just looked at from RJR-144  
could equally be used as a definition of addiction?

A- I think to a great extent, yes.

25 Q- When I turn the page to page thirty-one (31), where the

heading is addiction, and it says, and I quote:

"The term addiction refers to dependent  
patterns of drug self-administration without  
making a distinction between psychological and  
5 physical dependence. Traditionally, it  
carries with it the idea of moral weakness."

Could I apply that equally to drug dependence then if  
the difference is only a terminological quibble?

A- Well, as we discussed, I think people do use the terms  
10 with moral overtones and I -- I try very much not to.

Q- But even scientists do, don't they -- some?

A- Oh, I think they do.

Q- Doctor, we had discussed briefly, at the opening of the  
cross-examination, your participation in the work of a  
15 committee formed by the Royal Society of Canada to  
produce a definition of addiction -- and I would like  
now to show you a copy of the report of that committee.  
May I have that marked...

BY THE CLERK:

20 RJR-165.

Me IRVING:

I take it my friends don't want me to ask the witness  
whether he recognizes it as authoritative first,  
RJR-165.

25

Me EVRAIRE:

Don't be cute, Mr. Irving.

THE COURT:

What?

5 BY THE CLERK:

165.

Me IRVING:

Q- Now, Doctor, I think you said you had attended two (2)  
meetings of the committee, was it two (2) or three (3)  
10 that you personally attended?

A- My recollection was two (2). If you look on roman  
numeral four (4), there's a paragraph describing the  
meetings.

Q- Yes. So there were...

15 THE COURT:

Roman numeral...

Me IRVING:

Four (4).

THE COURT:

20 Q- Okay.

Me IRVING:

Q- The committee met in Toronto on June twenty-eight (28),  
twenty-ninth (29th). Did you attend that meeting?

A- Yes.

25 Q- Can you tell the Court how long these meetings were?

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A- I don't really recall.

Q- Then they met again on August the third (3rd), the  
eighteenth (18th) and the twenty-eighth (28th), that's  
three (3) other meetings as I make it -- is that right?

5 A- Yes.

Q- So in all there were meetings held on five (5) days and  
you're not sure just how long those meetings took?

A- No.

10 Q- Would I be right in saying, Doctor, that no independent  
research of any kind was commissioned by the Royal  
Society in the preparation of this report and that  
nothing was done except to review existing literature?

15 A- I think that's basically true. There were some analyses  
that, as I recall, were -- were calculated which hadn't  
been -- they hadn't been performed before on publicly  
available Canadian data sets, just as illustrations, but  
in the main, it was -- it was not a committee that  
generate new data but rather to review the literature.

20 Q- In fact, was any funding provided by anybody to -- to  
this group to produce this report, do you know?

25 A- There was a -- my understanding is there was a contract  
with the Royal Society, the Royal Society then paid the  
amount to Dr. Kalant, the chair of the committee, and he  
made a decision about allocating consulting fees from  
that amount. I don't recollect what that amount was.



Q- Was it, to your knowledge, Doctor, that the -- the funding to the Royal Society and the initiative, in fact, for the creation of this committee came from the government of Canada which provided the Royal Society with, I think, thirty-five thousand dollars (\$35,000) in order to have this report prepared?

A- I don't recall the amount but I think it's in the summary. It's -- it begins by saying:

"This report was prepared in response to a specific question from the Health Protection Branch."

So we -- we were aware that we were responding to a specific question from Health and Welfare.

Q- From the Health Protection Branch, indeed, of Health and Welfare?

A- Yes.

Q- Not to -- to put too fine a point on it, but in response to a request from Mr. Collishaw?

A- I -- I thought of it as a request that Neil Collishaw would have been involved with. I didn't think of it in particular as a request from him. I don't -- I don't know the details of how the -- how the project came about within the Health Protection Branch.

Q- Was it just coincidence, Doctor, that no less than four (4), I think, members of the committee are from the

7617

Addiction Research Foundation and only two (2) are not?

Me EVRAIRE:

Three (3).

Me IRVING:

5 Q- Three (3), sorry.

A- I certainly wouldn't think of it as coincidence. Dr. Kalant selected the committee and I -- I never asked him why he picked who he picked and I think that selection was up to him. I did not advise on who should be on the committee.

10

THE COURT:

Q- Who are the other members?

A- It's on...

Me IRVING:

15 My Lord, at the -- roman numeral four (4).

THE COURT:

Oh, okay, yes. Kozlowski, Ferrence and Corrigan.

Me IRVING:

20 Q- Ferrence. Dr. Corrigan is with the Addiction Research Foundation but Dr. Kalant is with the Addiction Research Foundation as well, isn't he?

A- Yes, he is.

Q- Although he's not shown to be on this particular membership list.

25 A- And Dr. Clarke from McGill as well.

9/0054

Q- Is he also with the Addiction Research Foundation?

A- No, he's not.

Q- No.

A- He's with McGill University.

5 Q- Yes. Well, there is a lawyer, Professor Friedland, someone from the McGill Faculty of Medicine, and all of the remaining members are from the Addiction Research Foundation, aren't they?

A- That's correct.

10 Q- Yes.

THE COURT:

And Friedland is a lawyer?

Me IRVING:

He's a law professor, My Lord.

15 THE COURT:

Well, he could be a lawyer too, and a professor of law.

Me IRVING:

Some of us would admit it more readily than others, My Lord.

20 Q- Now, without going through the report page by page, Doctor, I'd like you to look, if you would, at page eight (8) where the definition is found, one place it's found. If you see it, My Lord, in italics you will see a definition:

25 "Drug addiction is a strongly established

pattern of behaviour characterized by:

- 1) The repeated self-administration of a drug in amounts which reliably produce reinforcing psychoactive effects and
- 2) Great difficulty in achieving voluntary long-term cessation of such use, even when the user is strongly motivated to stop."

Do you consider that to be a scientifically accurate definition, Doctor?

10 A- Yes.

Q- There follow a series of notes. May I take it that those really form part of the definition and serve to explain what is meant in the definition?

A- That's an attempt to explain points, yes, the terms.

15 Q- "1) By "drug" we mean any substance other than a normal body constituent or one required for normal bodily function, for example: food, water, oxygen, which, when applied to or introduced in a living organism, has the effect of altering bodily function.

20 2) By "repeated self-administration" we mean any pattern of continuous or intermittent drug taking that includes periods of sustained intake at levels sufficient to produce reinforcing psychoactive effects."

25

Is it your opinion to the Court, Doctor, that intermittent drug taking will suffice for a proper definition of "addiction"?

5 A- It -- the intermittent pattern is not what you usually see with smoking. You see it with certain binge drinking problems in which you have somebody with a serious alcohol problem who is drinking regularly but intermittently. It's not an everyday drunk. It might be a weekly drunk.

10 Q- Okay. Like every weekend, for example?

A- It could be.

15 Q- Would -- while we're on that subject, in your opinion, would somebody who doesn't drink during the week but from arrival at home on Friday night to Sunday night is pretty well drinking the whole time and then can dry out for Monday morning, would that person be an addict in your definition of "addiction"?

A- It would depend on the ability to stop that weekend use if that person tried.

20 Q- Okay. And again, so you wouldn't know, in respect of that person, whether he or she was an addict or not, unless the person tried to stop and had difficulty or was unable to do it -- had difficulty in doing it?

A- Yes, that's correct.

25 Q- All right. Who was it that suggested adding

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"intermittent drug taking" to the notes, do you recall?

A- I don't recall, no.

Q- No. Would you turn back to page seven (7) of the report, there's a heading "Classical conditioning".

5 A- Yes.

Q- Do you see that, My Lord?

10 "Frequently repeated use of the drug in a specific context, e.g. in a particular social setting or during certain specific activities or at particular times of the day, can result in classical (Pavlovian) conditioning, so that the context itself comes to elicit the drug use or the desire for it. This is referred to as stimulus-controlled drug use and its  
15 appearance means that that drug use can no longer be regarded as voluntary behaviour."

I'd like to explore that with you for a moment, Doctor.  
If an individual smokes a cigarette in the morning with a cup of coffee, which is a typical pattern, that is use  
20 of tobacco in a specific context, a particular social setting or during certain specific activities, is it not?

A- Yes.

Q- Yes. Is it the opinion of your committee that cigarette  
25 smoking is in fact involuntary behaviour -- in the

Pavlovian sense?

5 A- Well, my own view would be that the classical  
conditioning factors can become a component. One  
factor, in this case an involuntary factor, influencing  
the amount of drug used. I don't see it as the only  
factor. I think any drug taking is influenced by lots  
of different factors. If you're having a cup of coffee  
and you're used to having a cup of coffee with a  
cigarette, that -- cuing and conditioning forces could  
10 -- could make you want to have a cigarette in a way  
that's, I think, not fully voluntary, but it's -- well,  
I see it as a complicated matter. I don't view it as  
the case that classical conditioning becomes the only  
driving force for taking drugs in an addictive drug  
15 user. I see it as a component that can be involved  
under some circumstances.

Q- I don't think I understand you, Doctor. If we are  
dealing with real classical conditioning, the behaviour  
is involuntary. I mean Pavlov's dogs salivated when  
20 they heard the bell and they couldn't stop it. Isn't  
that the...

A- Well...

Q- Isn't that the test?

A- There's an issue of what you mean by the behaviour.

25 Q- We're talking...



5 A- That certain components -- certain components would be  
that -- for example, the desire to have the cigarette  
might be cued. The behaviour of the taking the  
cigarette might be quite another matter. The person  
might then say: well, no I won't have that cigarette,  
even though, if you will, the arm is -- because of  
conditioning factors the arm is reaching out for the  
cigarette. So it's a bit of a question of what you call  
the behaviour here that there are certain components of  
10 classical conditioning -- well, it's an issue of what  
you're describing as "the behaviour." That the  
classical conditioning pressures would increase the  
likelihood of the behaviour of smoking, but I think it  
doesn't make it an inevitability.

15 Q- Is it involuntary or not, Doctor?

A- The ...

Q- It's either got to be voluntary or involuntary. Now,  
are you suggesting, and is this report suggesting, that  
it's involuntary.

20 A- No, certain responses, certain things, certain responses  
related to the taking of the drug would come along in an  
involuntary fashion. They would just happen, but  
there's another level of behaviour which wouldn't  
necessarily just happen. So, for example, a heart rate  
25 change that might be conditioned to a drug would be

involuntary, and that might stir up things that makes it more likely for you to use the drug. So that a certain part of the responses are involuntary, but still at another level, it's not involuntary.

5 Q- Is that what you say this paragraph that I'm reading at page seven (7) is meant to suggest? It says here that:

"Its appearance means that drug use can no

longer be regarded as a voluntary behaviour."

10 I don't think there's much doubt about what that says, Doctor.

A- Well, I...

Q- My Lord, it's five (5) minutes to the break, perhaps Dr. Kozlowski would like to -- if we adjourned.

A- I'd like to just finish this.

15 Q- Well, go ahead.

A- The -- I would not put the emphasis on this statement that Dr. Kalant did. Note that Dr. Kalant's citing his own work. I'm describing as I would indicate it. So I'm not fully comfortable with this the way it's expressed here.

20 Q- Not fully comfortable means you don't agree?

A- Not in all details. No, I mean, I think it -- I might have written it differently.

Q- You might have said something different?

25 A- As I'm trying to do, yes.

Q- Yes. You're succeeding, Doctor.

THE COURT:

Okay. We'll adjourn. Fifteen (15) minutes.

5

SHORT RECESS

Me IRVING:

I'm sorry, My Lord, I was looking for Mr. -- I hadn't realized Mr. Evraire had slipped by me. I thought the room was empty. I do apologize.

10

Q- Doctor, just before we leave the Royal Society Report, without going through it, you will find in that report, will you not, the definition adopted by the American Surgeon General in the nineteen eighty-eight (1988) report? You will find the World Health Organization's definition and numerous others?

15

A- I...

Q- Yes?

A- I recall it, yes.

20

Q- And no one of those was, in fact, adopted by the Royal Society and the one that was adopted was made up by your committee and it's the one we looked at a few minutes ago; and it is not, in terms, the same as any of the others, is it?

25

Let me help you, Doctor, you didn't adopt any of

those other definitions, did you?

A- No, we discussed them and argued that there was some strong common elements and felt that our definition was based on the strong common elements.

5 Q- Yes, okay. Now, finally on that subject, you told the Court this morning and you told the Court last week, that to the man on the street an addiction has no fixed meaning and, in fact, it has moral overtones, it has the elements of moral weakness we've been discussing, that  
10 it is a pejorative term; and you told us this morning that even in some scientific circles, that element of moral weakness is still there -- and I think you've also told us that dependence, as a term, is more neutral, it doesn't have that pejorative sense. Have I got you  
15 correctly on that?

A- I think it has -- it doesn't have the same pejorative sense, I think.

Q- No. Then if dependence doesn't have a pejorative sense and doesn't suggest moral weakness, and addiction does,  
20 and if they mean the same thing, then why did the Royal Society use addiction and not dependence. Why did you use a loaded word instead of neutral word?

A- Well, if the question really is why did the Royal Society do it, there is a discussion of the -- as I  
25 recall, there's a discussion of the basis for the

selection of the terms. It might be good to look at that.

Q- Feel free to do so but I...

A- On page eight (8), the -- under the heading  
5 "Dependence":

"As noted earlier, the World Health  
Organization expert committee on drug  
dependence recommended the term addiction be  
dropped from scientific and clinical use, and  
10 that it be replaced by the term dependence.  
Though the term addiction continues to be  
widely employed, it has become increasingly  
common to use it interchangeably with  
dependence."

15 Skipping the next paragraph.

"We feel that the use of the term dependence  
without specific qualification is ambiguous.  
In the nineteen sixty-four (1964) report of  
the World Health Organization expert committee  
20 ambiguity was already evident in that  
dependence was defined in terms of both the  
psychic or behavioral component that was  
always present in a physical component that  
might or might not be present."

25 You see that in the definition from the document from

the Addiction Research Foundation that Mr. Irving drew my attention to earlier today.

"This is further complicated by the fact that a physical physiological dependence is clearly present in some individuals with respect to drugs or substances that have nothing to do with drug addiction, e.g. the diabetic patient is physiologically dependent on insulin, but the definition does not differentiate between this type of physical dependence and the type identified by a withdrawal reaction in the chronic user of alcohol, heroin or nicotine, for example. Moreover, it is widely recognized that someone can be made physically dependent on a drug by repeated medical administration of that drug. For example, morphine administered to a patient by a nurse or a physician for relief of pain in doses sufficient to produce a withdrawal reaction when the drug is stopped yet show no subsequent opiate seeking behaviour. Therefore, physical dependence may be an accompaniment of addiction but it may also occur in the absence of addiction.

An addiction as defined above may occur

in the absence of physical dependence.

Therefore, there is a risk that the use of the term dependence might be interpreted as implying a different process than addiction, or one of lesser magnitude or gravity.

Q- Are there any other sections of the report you'd like to refer to?

A- Not really. I mean I had not -- I was prepared to talk on my own expert report and I have not studied this over again in preparation for the -- the examination today.

Q- I don't see any reference anywhere in the report, Doctor, to the problem involved in what you have told us which is that on the other hand addiction carries this overtone of moral weakness and is a pejorative term, and I also noticed that when you discussed the World Health Organization's decision to drop addiction for that very reason, that that reason is not given in this report? Why -- why is it, if you can tell me, that in the parts you've read out to us -- why is it that the committee didn't consider the rather unfortunate implications which arise from the use of a pejorative term like addiction? Was it considered and then decided not to put it in the report?

A- I don't remember the deliberations on that issue.

Q- Were there any?



A- I think given the technical flaws with dependence and other kinds of mistakes in communication with the public that calling it a dependence would bring about, that addiction was settled upon as a term that -- that best communicated the -- the behavioral pattern that was seen.

Q- Look at page three (3) of the report for a moment. There's a heading "Other Clinical and Scientific Definitions". It says:

"Despite the continued thought and effort sustained over many years that went into the refinement of the World Health Organization definitions, these definitions have not, in fact, been universally adopted and incorporated into everyday terminology."

You agree, do you, that a great deal of thought and effort did go into the refinement of the World Health Organization definitions in this area?

A- And there's been sort of a continuing change as new information is learned.

Q- Yes. Yes, all right. And they use the word dependence and think that is much preferable, don't they -- and have done for many years now?

A- I believe that's correct, yes.

Q- Yes. I go on reading on in that same paragraph:

"The term addiction continues to be widely employed and is enshrined in the names of such well known institutions as Ontario's Addiction Research Foundation."

5 That's your foundation, Doctor.

A- Yes.

Q- Is that one of the reasons you wanted to use the word addiction -- that's what it appears to say?

10 A- I suppose it can be viewed as one of the supporting reasons.

Q- Thank you. Was another supporting reason, Doctor, that the Health Protection Branch had prepared documents, oh a couple of years ago, imposing warnings on cigarette packages which included a warning that the product was  
15 addictive and that what was needed was definition that would make that warning justifiable. Was that brought to your attention by Mr. Collishaw or by anyone else?

A- My understanding was that the government did have plans to propose a warning label that used the term addiction  
20 and that the approach to the Royal Society was seen as a way of determining whether that was justifiable. I was aware of it to that extent.

THE COURT:

25 Before you move to another subject, there seems to be missing one roman numeral page. At least one.

Me IRVING:

I see, My Lord. I'm sorry, I've been using a different copy altogether than this printed one and...

THE COURT:

5 Because you terminate at roman numeral five (5). It doesn't seem to have the phrase.

Me IRVING:

You're quite right, My Lord, I'll make sure we get a complete copy. Are your copies all the same?

10 A- It has that flaw as well.

Q- Mine has that as well.

Me THIBAudeau:

Quelle est la différence avec...

Me IRVING:

15 Il y a la page cinq (5) qui manque.

THE COURT:

Cinq (5)?

Me IRVING:

It's part of the summary.

20 THE COURT:

Cinq (5), numeral five (5). Is there -- it's after that?

Me IRVING:

Yes, it's the summary and there's a bit missing.

25 A- I think there's just one more page.

Q- There's a missing page. I have the missing page, but in the manuscript form here, but I'll make sure to have that completed, My Lord.

THE COURT:

5 I'm always bothered when I see partial documents.

Me IRVING:

Well, thank you. I had not noticed. And, as I say, I was using the other copies.

10 Q- Doctor, you have said that part of your definition is this difficulty in giving up. Is it necessary in order to meet your test of addiction that upon cessation that there must be an abstinence syndrome or abstinence symptoms?

15 A- No. The key issue with me is the behavioral fact of not giving up, that -- another indication besides withdrawal symptoms would be, you try to give up, no matter what symptoms you have, if you go back to use, then it -- I would view that as evidence of it having been difficult to give up.

20 Q- And would it be your view that in order to qualify as an addiction, cessation must result in some sort of dysfunction?

A- No, I don't include that as...

Q- You don't think that's required?

25 A- No.

Q- Right. Would you look with me, for a moment, at page fifteen (15) of your expert report.

THE COURT:

The one AG-174?

5 Me IRVING:

Dr. Kozlowski's expert report, My Lord. I've forgotten what number it was given.

THE COURT:

There's one on the history of tobacco use...

10 Me IRVING:

No, it's not that one, My Lord.

THE COURT:

...and the other one, 174.

Me IRVING:

15 It's the role of nicotine in tobacco use. 174?

THE COURT:

M'hm.

Me IRVING:

20 Q- Without going through it in detail, Doctor, you refer halfway down that page to some empirical research you did amongst people using other drugs, and you indicate at page sixteen (16) that a certain percentage said that it would be harder to give up cigarettes than their problem drug, and so on.

25 A- That's correct.

Q- In fact, however, you would agree, would you not,  
Doctor, that because you were dealing in this case with  
people who were multi-drug users, that it is not  
possible to generalize the conclusions and apply them to  
the general population?

A- That's correct.

Q- Yes. And you wrote an article, did you not, it was  
published in the Journal of the American Medical  
Association in nineteen eighty-nine (1989), called:  
"Comparing Tobacco, Cigarette Dependence with Other Drug  
Dependencies," in which you referred to the same study  
which is on page fifteen (15) and sixteen (16) of your  
expert report?

A- Yes.

Q- And concluded:

"Our findings should not be construed as  
showing that smokers who are not dependent on  
other drugs would perceive quitting to be as  
difficult as judged by our informants.

'Clinical' samples often show a greater  
dependence problem than do more representative  
samples of substance users. Most cigarette  
smokers give up smoking without formal  
treatment, as do most heroin users when giving  
up heroin. "

Is that a fair statement of your...

A- Yes, I believe that.

Q- ...your view?

Me IRVING:

5 Unless my friends want, I don't propose to file this in  
the record, My Lord. It's only for that passage that I  
wanted to look at it.

Me EVRAIRE:

10 It's my friend's case. If he wants to put it in, so be  
it.

Me IRVING:

No, it's not. I'm happy to hear it's my case, My Lord.  
I thought I was cross-examining the witness.

Me EVRAIRE:

15 Your witness.

Me IRVING:

He's not my witness either. Anyway.

THE COURT:

Your victim.

20 Me EVRAIRE:

Interesting observation.

THE COURT:

Or trying to make you his victim.

Me EVRAIRE:

25 That's better.



Me IRVING:

Q- Doctor, you -- I want to show you a book called  
"Research Advances in Alcohol and Drug Problems", Volume  
10. Let me ask you if that's the same series of volumes  
which you refer to in the third page of your expert's  
report when you say:

"Currently, I am senior editor of the  
distinguished serial publication on alcohol  
and drug abuse, "Research Advances in Alcohol  
and Drug Problems (plenum)."

A- That's correct.

Q- And the volume I've shown you is...

A- Volume 10?

Q- ... part of that distinguished serial publication? And  
you were the senior editor at the time this particular  
volume came out?

A- Yes.

Q- I want to ask you about an article which appears in this  
volume, Doctor, which I'll give you a copy of. The  
article is entitled "Effects of Abstinence from Tobacco  
- A Critical Review" by John Hughes and two (2) other  
authors. Are you familiar with that article, Doctor?

A- Yes.

Q- And you know John R. Hughes, do you?

A- Yes, I do.

Q- And you accept that he is an eminent researcher in the field, and a prolific publisher, in fact, of empirical studies?

A- Yes.

5 Q- All right. And would you accept that this article is an authoritative statement of the state of empirical research on the subject matters which are covered by it?

A- Yes.

10 Q- And, in fact, you had something to do with writing it, didn't you?

A- As senior editor, I assigned reviewers to it and indicated the changes and so on that reviewers requested. Then it was up to Dr. Hughes to -- to revise as he saw fit, based on that suggestion, those suggestions.

15 Q- Okay, but you actually made comments on the manuscript itself, you yourself? There's an acknowledgement thanking you for doing so, just at the end.

A- Yes, I did comment on the manuscript, yes, certainly.

20 Q- The authors thought your comments were helpful, Doctor. They said:

"The authors thank Lynn Kozlowski and others for their helpful comments on this manuscript."

25 A- Yes.

Q- All right. Now, I just wanted to -- I'm not going to go through...

Me EVRAIRE:

Dr. Kozlowski suffers from great humility. That's the problem.

Me IRVING:

Very becoming.

Q- Doctor, there are a series of conclusions which begin at page three eighty-one (381) and I just want to look at a couple of those with you.

THE COURT:

What page, I'm sorry?

Me IRVING:

It starts at page three eight one (381), My Lord, the heading "Conclusions".

Q- Just look at the first of them:

"Abstinence from tobacco can induce offset, transient and rebound effect. Unlike many other drugs of dependence, tobacco abstinence does not induce physical symptoms or novel effects."

Would you agree with that, Doctor?

A- Well, Dr. Hughes is speaking about these terms and very precisely, and is, in fact, proposing a way of talking about physical symptoms, such that some of his offset

and transient symptoms and rebound effects are what many other scientists would view as physical symptoms. By definition, he does not consider them the physical symptoms of interest and so within -- within the terms of his essay, yes, that's -- given how he uses those terms, that's correct.

Q- Does he not also find, if you turn the page and look at conclusion number nine (9), that:

"The only valid abstinence effects found to be due to nicotine deprivation in humans are increased heart rate -- decreased, I'm sorry -- heart rate and memory and increased anger, anxiety and impatience."

It's his conclusion, is it not?

Me EVRAIRE:

I wonder if we might give the witness a few moments...

Me IRVING:

Oh, sure.

Me EVRAIRE:

... because there is reference to four (4) through seven (7) there that I think he should read just to be answering properly.

A- That is Dr. Hughes' conclusion, yes.

Me IRVING:

Q- Yes. And does he not also conclude in -- look at number

nineteen (19):

"Abstinence effects have yet to be clearly shown to be important in the maintenance or cessation of smoking."

5 That's another conclusion?

A- That's true and correct for other kinds of drug addictions, yes.

10 Q- All right. And indeed, if we look at the abstinence effects which are listed in conclusion number nine (9), do we not find at page three three two (332) of the article, Doctor, that:

15 "On the decline in heart rate, all that can be concluded is that it appears to be due to nicotine deprivation, that some studies did not find that effect and in fact that the findings are equivocal."

THE COURT:

Where are you reading?

Me IRVING:

20 Page three three two (332), My Lord.

THE COURT:

Oh, three three two (332).

25 Q- The decline in the last paragraph. Some studies found that effect, some studies didn't, isn't that what's reported here, Doctor?

A- I probably should read this discussion again. I believe what's more at issue here is not the -- not the heart rate decrease on smoking cessation but the evidence that that's the nicotine...

5 Q- Yes.

A- ...deprivation effect rather than a cigarette deprivation effect, which includes...

Q- Quite so. They're talking here about...

A- I think that's the -- that's the...

10 Q- ...deprivation of nicotine, yes and that is equivocal, isn't it, simply from reading it?

A- I think in Dr. Hughes' mind it was not fully settled, that's clear.

15 Q- If you turn over to page three three five (335), there's a discussion in the second full paragraph on that page about caffeine intake. It is a fact, is it not, that smokers are very often coffee drinkers as well?

A- Yes.

20 Q- And there's a reference to a study done by Dr. Benowitz at the bottom of that paragraph, I read the following:

25 "This finding could be important in that it suggests the possibility that some of the symptoms of tobacco withdrawal, for example: anxiety, restlessness, impatience, might be due to caffeine intoxication."

Sachs and Benowitz. Is that -- do you see that?

A- Yes, I do.

Q- Yes, do you have any disagreement with that, Doctor?

A- I think that's an interesting hypothesis.

5 Q- Quite a possible one?

A- It certainly merits further research, it's a possibility, yes.

10 Q- Yes. All right; and is it not also suggested that in this article, Dr. Kozlowski, that when we deal with anger, it's not at all clear that increased anger is the result of abstinence, but it's equally possible that smoking simply reduces base line anger levels. You really can't tell which is which, isn't that true?

A- That's...

15 Q- Let me read you from page three forty-nine (349) at the bottom of the second paragraph.

"Thus, in reality, the data do not indicate...

Me EVRAIRE:

20 Excuse me, Mr. Irving, could we get to the same page, three four ...

Me IRVING:

Three four nine (349), I'd already referred to the page.

Q- Three four nine (349), second paragraph, last sentence.

25 "Thus, in reality, the data do not indicate



deprivation increases aggression but rather  
that smoking decreases aggression."

Do you accept that doctor?

5 A- I think there is a general issue here and that it is  
difficult to tell which is the correct interpretation.

10 Q- In short, Doctor, would you not agree that for every  
single one of the abstinence effects which Dr. Hughes  
said might be ascribed to nicotine deprivation, there is  
not one of them that's not equivocal, there is not one  
of them where there is not an alternative explanation,  
and the explanation is given in that very article, and  
it is open -- it is an open question even for those  
whether it is really a deprivation effect or not? We've  
gone through them all except memory. I can take you to  
15 memory if you like. Isn't it a fact that's it's all  
equivocal?

A- I think there are questions...

20 Q- And it's not in the least equivocal, is it, when it  
comes to drugs like heroin? There is physical  
dependence. There is a physical withdrawal syndrome,  
there are physical signs -- that's true too, isn't it?

A- It is also the case with a drug like heroin that it's  
been found that the physical symptoms are quite  
dissociable from the -- the drive to continue to use the  
25 drug, that there's been a tendency to put a lot of

weight on the physical dependence part of the definition and the psychological part of the dependence, the -- which is also described as the compulsion to use the drug or the psychic dependence, has been quit dissociable from physical dependence in numbers of studies.

Q- That wasn't my question, Doctor. All I was saying was it is true though, is it not, that when we deal with say heroin, without the slightest equivocation, there are physical withdrawal symptoms, there is a withdrawal syndrome?

A- That's correct.

Q- Yes; and for alcohol there is a withdrawal syndrome, it's not equivocal?

A- That's correct.

Q- And for all the other so-called drugs of addiction?

A- Cocaine is a bit dodgy to see a withdrawal syndrome in but -- but it's -- if you look you can find it.

Q- Yes. Now, I want to -- may I have that article marked, please, as Exhibit RJR-166.

THE COURT:

One?

BY THE CLERK

166.

Me IRVING:

Q- Doctor, did you write an article in the American Journal  
of Public Health in nineteen eighty-seven (1987)  
entitled "Less Hazardous Smoking and the Pursuit of  
Satisfaction"?

A- Yes.

Q- Less hazardous advocacy being we don't have these  
microphones at head level.

THE COURT:

Could I just bug you and...

Me IRVING:

My Lord, yes.

THE COURT:

In the previous exhibit, RJR-166, in the conclusions at  
page three eighty-three (383). Again, I keep in mind  
what you said the other day but still...

Me IRVING:

And withdraw the question, My Lord. I think I may.

THE COURT:

Could you just explain to me what is the -- do you have  
that article?

A- Yes, I do.

Q- The conclusion twenty-one (21), the latter part:

"Unlike other drug withdrawal syndromes,  
abstinence effects from tobacco are not

clearly related to dose and duration of drug  
use, have not been shown to be precipitated by  
antagonists, do not appear to persist for  
prolonged periods and have not been shown to  
5 be conditioned to environmental stimuli."

What is that, what does that mean? I'm not -- the last  
part of the sentence?

Me IRVING:

The environmental stimuli?

10 THE COURT:

Right.

Me IRVING:

Not conditioned?

A- He's arguing that there hasn't been a demonstration of  
15 the -- of a conditioned link between withdrawal symptoms  
and environmental stimuli -- like it could be the sight  
of somebody else smoking or seeing a cigarette pack or  
-- or being in a setting that you're used to be smoking  
in. There -- there is...

20 THE COURT:

So he says it seems that the -- yes.

A- There's a study that I cite which came out after this  
was done in -- which does show evidence for  
conditioning. It's the study by -- it's the study by  
25 Abrams, but actually he may be...

Q- What is the date of this one, the...

A- This one, the -- it was published in January. His...

Q- January of what year?

A- January of this year.

5 Q- Nineteen eighty (1980) -- ninety ('90)?

A- This -- his text was probably finished -- I think  
sometime in March of eighty-nine ('89). There were  
substantial delays in waiting for some other authors to  
complete their chapters.

10 Me IRVING:

Q- You are referring to Abrams' article?

A- Yes, there's not -- there's a different -- there's not a  
lot of evidence on this point.

THE COURT:

15 I was just wondering what it meant?

A- Does that help at all?

Q- Yes, okay. No, you've explained what it meant. I  
understand now what was meant by this thing.

And when he says:

20 "It has not been shown to be precipitated by  
antagonist ..."

-- do you know what means?

A- Yes, the classic procedure in the study of opiate use is  
to give a drug that is an antagonist. It blocks the  
25 action of the opiate and you -- you can precipitate a

withdrawal by chemically interfering with the availability of the opiate to the nervous system and the -- so he -- actually I don't recall his discussion of this issue.

5 Q- Probably inside.

A- Pardon me?

Q- It's probably within the...

A- Yes.

Me IRVING:

10 It's a discussion of mecamlamine. I'll find it for you. I know it's here. All right. It's at page three eighty-one (381). I'm sorry, I was looking in the wrong place, My Lord. You'll see starting at page three  
15 seventy-nine (379) there's a heading called: "Tobacco Versus Other Abstinence Syndromes," and then within that section...

THE COURT:

Oh, okay.

Me IRVING:

20 ...at page three eighty-one (381), right at the top of the page, it says:

"Withdrawal syndromes can often be precipitated by the antagonist, i.e. blocker of a drug. The most widely known  
25 example is naloxone-precipitated opioid

withdrawal. Mecamylamine is a C.N.S.  
blocker of nicotine. However, it does  
not appear to precipitate withdrawal when  
given to smokers."

5 A- I believe there's some issue about the adequacy of  
mecamylamine as a blocker of nicotine. This, however is  
not my area of expertise. Dr. Benowitz would be a  
better judge of that particular issue.

Q- All right.

10 THE COURT:

Okay.

A- It's page three eighty-one (381).

Me IRVING:

Three eighty-one (381) at the top of the page.

15 THE COURT:

I'm sorry, Mr. Irving.

Me IRVING:

No, not a problem, My Lord.

20 Q- Then I was talking about an article you had written, Dr.  
Benowitz, in the American Journal of Public Health.  
"Less Hazardous Smoking and the Pursuit of  
Satisfaction."

A- Yes.

Q- Now, you were the sole author of that, were you not?

25 A- That's correct.



Me BAKER:

Just to clear up the record, you just called him Dr.  
Benowitz by mistake.

Me IRVING:

5 Yes, Dr. Kozlowski, I'm sorry.

Q- And in general the subject you were discussing in the  
paper, was it not, was the benefit of smoking lower tar,  
lower nicotine cigarettes for those who will insist on  
smoking?

10 A- That's correct.

Q- Yes. Let me direct your attention to page five forty  
(540) in the right-hand column at the bottom. You say  
this:

15 "Like it or not, there will be millions of  
cigarette smokers for many years to come,  
despite the substantial progress..."

A- I'm sorry. Where are you? Oh, I've got it. Sorry, go  
ahead.

20 Q- "Limits of Persuasion" this is called, My Lord, at the  
bottom right-hand.

THE COURT:

Oh, okay.

Me IRVING:

The right-hand column at the bottom.

25 "Like it or not there will be millions of

cigarette smokers for many years to come,  
despite the substantial progress that has been  
made in reducing the prevalence of smoking.  
Less hazardous ways of tobacco use are needed.  
5 H.L. Mencken doubted that the so-called "drink  
problem" could ever be solved, because  
humankind could not be rescued from its own  
incurable hoggishness. Solutions to the  
cigarette smoke problem are similarly impaired  
10 by a fundamental hoggishness. For those who  
will not stop smoking, less hazardous smoking  
practices may need to be forced upon the  
consumer, much the way other public health  
measures, public sanitation services,  
15 mandatory immunizations have been forced on  
people who will live in modern society."

Doctor, what do you mean by "hoggishness?"

A- Well, I'm trying to be a bit playful with language here.  
This is an editorial...

20 Q- All right.

A- ...commenting on another technical piece on the use of  
low yield cigarettes.

Q- You were quoting Mencken.

A- I'm quoting Mencken. And the -- I think what I mean by  
25 it is kind of a general human phenomenon, certainly not

one particular to smokers, to do things you enjoy to --  
as much as you can get away with.

Q- A hog is a pig, isn't it, Doctor?

A- Well, I believe if you read the context of that, and are  
5 familiar with H.L. Mencken, I think you would understand  
the tone that I'm trying to reach. A hog is indeed a  
pig, yes.

Q- Mencken was himself quite a drinker?

A- And I believe a smoker.

10 Q- Yes.

THE COURT:

I'm trying to find a French word for that. I can't find  
it.

Me BAKER:

15 Cochon.

Me IRVING:

Cochon.

THE COURT:

That I know. I mean the context of the ...

20 Me BAKER:

People had enough trouble with Mencken's English, let  
alone trying to translate the meaning into another  
language.

Me IRVING:

25 Q- Wasn't it Mencken, Doctor, who coined the word:

"bibliobibuli," for people who were drunk on books?

A- I'm afraid I don't know that one.

Q- You don't know that. Take it from me that he did. And he was a drinker himself.

5 A- He was writing in the time of prohibition and talking about what -- the advantages of an outright prohibition against drink.

Q- You're not suggesting that cigarette smokers are pigs, Doctor?

10 A- I would -- I would much prefer somebody to read that paragraph and just make their own interpretation of it. I'd certainly think it far fetched to...

Q- All right.

Me BAKER:

15 Let him finish. Finish your sentence.

A- I -- I'm in fact not talking about cigarette smokers in particular. I mean I'm talking about kind of a general human phenomenon which I...

THE COURT:

20 Humankind. Human nature.

A- Humankind -- and I fall in that category, Mencken did, smokers do, and I don't feel any disrespect intended in that -- in that passage.

Me IRVING:

25 Q- Let me comfort my friend, Mr. Baker, Doctor, I was

making it quite clear that I don't think you were trying to suggest any such thing, so...

A- Thank you.

Q- But you were suggesting...

5 Me BAKER:

I've learned a long time ago, Mr. Irving, not to take anything like that for granted.

Me IRVING:

10 Q- You were suggesting, weren't you, that people like to do what they like to do and it's difficult to get them to stop?

A- Indeed.

Q- Now...

THE COURT:

15 Are you giving a number to this?

Me IRVING:

Yes. May we have this marked, please, as RJR-167.

20 Q- Did you write a chapter in a book called: "Smoking and Human Behaviour," edited by Tara Ney and Anthony Gale, Doctor?

A- I am co-author of that chapter, yes.

Q- You're a co-author.

A- Co-author, the senior author was Robert Coombs. And Roberta Ferrence was also a co-author.

25 Q- M'hm. Have you got a -- I'm sorry. Have either of you

got a highlighted copy which I might have given you by mistake? The chapter which you and Dr. Ferrence and Coambes contributed was fifteen (15), "The Future of Tobacco Use in Smoking Research"? Is that correct?

5 A- Yes.

Q- At page three forty-one (341), on the left-hand column, I read:

10 "Smoking today is considered unhealthy,  
offensive to non-smokers and in some circles  
quite deviant."

Do you consider smoking to be deviant, Doctor?

A- In some circles, certainly.

Q- Do you?

A- In some circles it's deviant, there is no doubt.

15 Q- Oh, I see. I see.

A- No, no. Do you understand the meaning here?

Q- In some circles, you mean...

Me EVRAIRE:

Social.

20 Me IRVING:

Q- It refers to some circumstances?

A- Deviance is always defined with respect to a social context that you deviate from. So that if...

Q- I see.

25 A- ... nobody at your work smokes, you're deviant with

respect to smoking at that work.

Q- Do I take it you used "deviant" in a non-pejorative sense?

16/0042

5

A- The -- it's -- it can be. It certainly is the case that in some circles it is deviant in a pejorative sense, that you're not doing something proper, to be smoking.

Q- Okay. Further down in that paragraph, I read:

10

"As the number of smokers dwindles, it will be easier for the rest of society to isolate and stigmatize them."

A- Citing the book by Nuehrink and Markel, yes.

Q- I read on:

15

"Changes in the demographics of those who continue to smoke mean that future smokers actually will be more abnormal or deviant. The large majority of middle-aged men smoked. Social pressures encouraged others to take up smoking ..."

-- I leave off the bracket --

20

"... and social pressure to smoke subsided in the mid-nineteen sixties. Those who found it easiest to quit did so."

-- I leave off a sentence --

"The pool of remaining smokers ..."

25

-- that's present smokers, isn't it --



5 "... by definition tend to contain a higher  
and higher percentage of smokers who are  
"unable to quit smoking". These remaining  
smokers were those best able to resist the  
social disapproval and censure that  
accompanies tobacco use and perhaps other  
types of deviant behaviour."

Is that your description of present-day smokers?

A- I think that's generally true.

10 Q- Yes? You think that's generally true?

A- Yes.

Q- "Increasingly, the behavioral characteristics  
of those who continue to smoke are likely to  
be perceived as abnormal by non-smokers.

15 Smokers are reported to have greater  
anti-social tendencies, including  
belligerence, psychopathic deviance,  
misconduct, rebelliousness, defiance and  
disagreeableness."

20 Do you share those views, Doctor?

A- That's, in fact, what the data show. I mean, it's --  
it's not a big effect. It's not the sort of thing that  
you'd say every smoker has these characteristics, but  
when you have a sample of smokers compared to a sample  
25 of non-smokers, you'd get a statistically significant

difference in factors like that.

Q- Psychopathic deviance? What does that mean? What's a psychopath?

5 A- Well, actually the way it's expressed in some of the studies is the -- you see smokers being readier to be straightforward and honest about sensitive issues that non-smokers would be more inclined to conceal information on. Somebody who has psychopathic  
10 tendencies is -- is not concerned about some of the disapproval of -- of -- of friends, about certain emotional circumstances that a non-psychopathic person is concerned about.

Q- All right. At page three forty-three (343), under the general heading "Research Issues", there is a heading  
15 called "Smoking as a Psychopathological Behaviour":

"If smoking declines ..."

-- it says --

20 "... smokers will increasingly be viewed as psychopathological. Research suggests that smokers are more likely to be anti-social and neurotic, have a history of adolescent rebelliousness or deviance, be impulsive risk-takers, come from troubled families and have parents who smoke. This negative social  
25 profile will be exacerbated by the tendency of

those smokers to smoke heavily, use other  
drugs and associate with other smokers."

Do you associate yourself with what's stated there,  
Doctor?

5 A- I think that's basically correct.

Q- Having parents who smoke is given as part of a negative  
social profile. Do you agree with that?

A- I'm thinking more of coming from troubled families,  
split families, things like that, as part of a negative  
10 social profile.

Q- Those are all factors, aren't they, in these psycho  
socio influences which may have something to do with  
smoking, of which you wrote?

A- I'm not sure what you're...

15 Q- Well...

A- Things like...

Q- Parents who smoke, for example?

A- Yes.

Q- You would agree that that has quite a bearing on whether  
20 children smoke or not?

A- That's true.

Q- I'd like you to look at the nineteen seventy-nine (1979)  
Surgeon General's report.

THE COURT:

25 Nineteen seventy-nine (1979)?

Me IRVING:

Nineteen seventy-nine (1979).

Me EVRAIRE:

Is my friend marking this "Smoking Behaviour" chapter?

5 Me IRVING:

Oh, I'm sorry. Yes, indeed, RJR...

THE CLERK:

168.

Me IRVING:

10 Thank you. You can give the -- give Dr. Kozlowski a  
copy.

Me EVRAIRE:

Does the Court have a copy of it?

THE COURT:

15 Yes.

Me IRVING:

Do you have the whole report, My Lord?

A- What page? Chapter eighteen (18), is that it?

Q- I wanted to start at chapter sixteen (16).

20 A- Oh.

THE COURT:

Is there a chapter sixteen (16)?

Me EVRAIRE:

Part two (2).

25

Me IRVING:

If you look at the bottom left corner, My Lord, the chapter numbers are always given, so that...

A- You'll see a sixteen dash three (16-3).

5 Me IRVING:

... you'll see which chapter you're at. It'll always say thirteen dash something, fourteen dash something, fifteen, and then that will show you.

Me EVRAIRE:

10 There are two (2) volumes, I note.

THE COURT:

Okay.

A- It's volume 2.

Q- Okay. Because I was looking at only eleven (11). Maybe  
15 we could sort it out and start afresh at two fifteen (14H15)?

Me IRVING:

My Lord, if I may say, I'm almost finished, but that  
would be fine.

20

LUNCH ADJOURNMENT

In the year of Our Lord nineteen hundred and ninety (1990),  
on this fourteenth (14th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

17/0050 5

Me IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et  
Georges Thibaudeau.

Me POTTER:

For Imperial, Simon Potter.

10

Me BAKER:

For the Attorney General, Roger Baker, Paul Evraire,  
Claude Joyal and Lise Tremblay.

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In the year of Our Lord nineteen hundred and ninety (1990),  
on this fourteenth (14th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

5 LYNN T. KOZLOWSKI,

WHO, having previously made a solemn declaration, doth depose  
and say as follows:

10 CROSS-EXAMINATION BY Me COLIN K. IRVING (CONTD),

On behalf of Petitioner, RJR-Macdonald Inc.:

Q- Doctor, just before I come to the Surgeon General's  
report, there is something I have to ask you before. In  
the article "Smoking and Human Behaviour" that we looked  
15 at earlier, the expression "psychopathic deviance" is  
found in two (2) or three (3) different places.

A- M'hm. Yes.

Q- In DSM-III and, in fact, in DSM-II, was it not suggested  
that "psychopathic" should no longer be used and that  
20 the term "sociopath" was substituted because  
psychopathic had in fact a very pejorative sense which  
the American Psychiatric Association thought should be  
avoided?

A- Yes. In fact, my own preference is to use the term  
25 sociopath. The -- it was Dr. Coombs' preference to use



this terminology and then -- the DSM-III is a manual of the American Psychiatric Association. Dr. Coambs' discipline is psychology and there is -- there are some discrepancies in the use of terms to describe behavioral disorders between psychologists and psychiatrists.

Q- But psychopathic is a pejorative term, isn't it?

A- I prefer sociopath, I would agree with you, yes.

Q- Now...

THE COURT:

Q- It's the way it's phrased though. It's amazing. When you read that paragraph on page three forty-three (343), there seems to be a gradation of evilness.

"Research suggests that smokers are more likely to be anti-social and neurotic, have a history of adolescent rebelliousness or deviance, be impulsive risk takers, come from troubled families and ..."

-- finally the culmination --

"... have parents who smoke."

A- Yes.

Q- "This negative social profile is exacerbated by the tendency of these smokers to smoke ..."

-- again another gradation --

"... to smoke heavily, use other drugs and ..."

-- culmination --

"... associate with other smokers."

It's a funny way of writing things.

A- Well, the -- let me point out some emphasis here.

5 Me BAKER:

Let the record show that it was not the Attorney General  
that introduced this document to this witness.

THE COURT:

No, no.

10 A- The -- if I might comment on...

Q- Yes?

A- ... on some of these points? The emphasis is on  
projecting what's going to happen, and what we say here  
is smokers will increasingly be viewed as -- we're  
15 talking about a process that would happen over -- over  
many years. It is the case that if you look at the  
research literature on sociopathy and the children who  
are most likely to take up smoking or the kids who are  
more likely to get in trouble in other ways, they tend  
20 to be less likely university-bound children and so on,  
but we are talking about reliable differences in  
tendencies here, and I would want to emphasize that it's  
not that all smokers have these characteristics. It's  
that if you get a large sample of smokers, the odds that  
25 they come from a broken home, say, would be higher than

a large group of non-smokers. It's -- I think this is -- would -- it would be an unfortunate exaggeration to take it as a statement that all smokers are this way.

5 It is, however, the case, that if you look at the data on a large scale, that the odds are different of people who smoke having these other characteristics, that -- the relationship between having problems with alcohol use and so on. It is a statistically reliable relationship.

10 That's not to say that there aren't smokers who are heavy smokers who don't have trouble with alcohol. It's a question of a difference in odds and, again, this article is projecting what's to be happening in the future based on where things stand now and it's -- it's  
15 not a statement about where things stand now.

Me IRVING:

Q- But that particular sentence is, isn't it, Doctor:

"Research suggests that smokers are more likely to be ..."

20 A- Oh yes, but these are -- these are...

Q- That's the present. That's the present tense, isn't it?

A- Yes.

Q- Okay.

A- Yes, but -- but increasingly this is going to be a  
25 problem, let's say. I don't think these are big

effects.

Q- So that if you looked at one (1) demographic group, for example, and found that smoking prevalence was much higher in that group than in another demographic group, what you're saying is in that group with the higher smoking prevalence, you would find more people who are anti-social, neurotic and so on?

A- That's correct.

Q- Now, we were looking at the Attorney General's report of nineteen seventy-nine (1979)...

A- Surgeon General's.

Q- Surgeon General's, forgive me.

THE COURT:

What chapter?

Me IRVING:

Q- And you have testified that you wrote chapter eighteen (18), Doctor, which I'll come to in a second. Would you look at this, for the moment, at chapter seventeen (17), which is headed "Smoking in Children and Adolescents, Psycho-Social Determinants and Prevention Strategies".

Me EVRAIRE:

If my friend doesn't mind, I'll just read with the witness because I don't have a second copy of the same one we gave Dr. Kozlowski.

Me IRVING:

Q- Now I see -- I see that the chapter you wrote, eighteen (18), is entitled "Psycho-Social Influences on Cigarette Smoking" and I wondered if, although you didn't write it, you had anything to do with the preparation of chapter seventeen (17)?

A- No, I did not.

Q- Are you familiar with what is stated in chapter seventeen (17)? Did you...

A- I haven't read it for probably ten (10) years when we had...

Q- Did you review it at the time?

A- No, I did not review it.

Q- Okay.

A- I did not review any of these chapters. I just wrote the one I wrote.

Q- You just wrote chapter eighteen (18), right. All right, I won't ask you about chapter seventeen (17). If you look at chapter eighteen (18), this is the one you wrote?

A- Yes.

Q- Could you turn to page twenty-two (22), it's marked eighteen dash twenty-two (18-22). There's a heading "Some General Psycho-Social Influences on Smoking" and then the sub-heading "Mass Media and Smoking". Do you

see that?

A- Yes.

Q- May I take it that everything that follows you wrote?

A- Yes, I wrote that.

5 Q- It says:

"There is little persuasive empirical research  
available on the effects of television  
advertising or its ban on cigarette sales  
around recruitment to the ranks of smoking.  
10 Bans on television advertising for cigarettes  
in several countries, including the United  
Kingdom, Denmark, Ireland, New Zealand and  
Italy seem to have had almost no effect on per  
capita cigarette consumption."

15 And there is a reference. I take it that you had  
familiarized yourself with the literature at the time  
and reached that conclusion, Doctor?

A- That's what I concluded from the literature...

Q- The conclusion -- yes.

20 A- ...at that time, that's correct.

Q- Okay. If you turn to the next page, twenty-three (23),  
I want to look with you at the second -- the first full  
paragraph on the page.

25 "Whiteside has presented an interesting though  
speculative analysis of media influences on

smoking."

First of all, who is Whiteside?

A- He's -- this was an article in the New Yorker magazine.  
He's an essayist.

5 Q- It goes on -- and I'm quoting now from you:

"From 1922 to 1952 in the United States,  
cigarette sales increased 639%. Over the same  
period, the population grew only 54%.

10 Cigarette advertising, he argues, had a large  
effect on building the cigarette market."

That, I take it, is the thesis advanced by Mr.  
Whiteside?

A- That's correct.

Q- The text then continues. This is you writing again.

15 "More recently, however, the cigarette market  
has been in a relatively mature stable state."

A- This is meant to continue the Whiteside statement.

Q- You're saying that this is what Whiteside said?

20 A- Yes. This is meant to be a continuation of his -- his  
opinion on that matter.

Q- All right.

"More recently, however, the cigarette market  
has been in a relatively mature stable state  
and has had a much lower rate of growth."

25 So you say that's Whiteside?



A- Yes.

Q- And you're adopting what he says here?

A- No, no, I'm reporting what he says.

Q- I see. Then it goes on:

5 "As the cigarette industry has asserted, the  
major action of cigarette advertising now  
seems to be to shift brand preferences to  
alter market shares for a particular brand."

10 Is that your conclusion or are you saying that's  
Whiteside?

A- Again, this is a representation of Whiteside's view.

Q- So if I look at the Whiteside article, which is footnote  
one o four (104), you're telling me I'm going to find  
those statements?

15 A- To the best of my recollection.

Q- And that will be an article called "Smoking Still" in  
the New Yorker of November eighteenth (18th), nineteen  
seventy-four (1974), by Whiteside?

A- I believe that's the correct reference, yes.

20 Q- Would you just look at it because I want to make sure I  
have the right article.

A- I -- I -- I mean I believe...

Q- There's only one (1)...

25 A- I don't know of any other Whiteside article in the New  
Yorker, that's correct.

Q- All right, then you agree with me that there is no other Whiteside article cited in this chapter?

A- Yes, to the best of my knowledge, yes.

Q- Turn to the next page, Doctor, there's a paragraph just  
5 at the bottom which reads as -- starts as follows:

"Personal gratification is often not  
considered a socially acceptable motive for  
drug use in the United States and probably in  
many other western, industrialized cultures."

10 Now, is that you speaking there or is that a report by  
you of somebody else?

A- Well, that's my view. And let me see what reference --  
reference ten (10) is Edward Brecher who wrote the book  
"Licit and Illicit Drugs," and I think there's support  
15 for that statement in his monograph.

Q- Right. Now, coming back to page twenty-three (23) again  
for a moment, I mean you have given your evidence that  
what you were doing was simply reporting what Whiteside  
had said. Without going through the rest of it, may I  
20 take it, Doctor, that there is nothing which you have  
said in this chapter to suggest any disagreement with  
Whiteside's position?

A- No. I introduce it, as you point, as an interesting  
though speculative analysis of media influences. I  
25 don't consider it -- I mean I didn't consider it

conclusive, but worth noting as one of the views in the area.

Q- He refers to the cigarette market being in a relatively mature, stable state. Did you accept that at the time?

5 A- I didn't dispute it at the time. I was trying to represent this view and I don't recall what my view would have been in nineteen seventy-eight (1978) when I wrote this chapter about how stable the market was.

Q- Thank you. Those are all my questions for this witness,  
10 My Lord.

THE COURT:

Do you have a cross-examination Mr...

Me POTTER:

No, I don't, My Lord. Thank you.

15 Me EVRAIRE:

We have a brief re-examination, My Lord.

RE-EXAMINATION BY Me PAUL EVRAIRE

on behalf of Respondent

20 Q- Dr. Kozlowski, do you have RJR-166 before you, the "Alcohol and Drug Problems", volume 10?

A- Yes.

Q- Could you turn to page three eighty-three (383) of that.

THE COURT:

25 Excusez.

Me EVRAIRE:

Oui, c'est le 166, celui-ci.

THE COURT:

Smoking and...

5 Me EVRAIRE:

No, "Alcohol and Drug Problems".

Me IRVING:

The article "Effects of Abstinence from Tobacco".

THE COURT:

10 Okay.

Me IRVING:

Three eighty-three (383)?

Me EVRAIRE:

Yes.

15 Q- I just want to clarify something with you. His Lordship referred you and asked you a question or two about chapter twenty-one (21) at page three eighty-three (383).

A- Yes.

20 Q- And I'm looking at the end of that sentence which starts with the words: "Unlike other drug withdrawal syndromes" -- let me finish it:

25 "Abstinence effects from tobacco are not clearly related to dose and duration of drug use, have not been shown to be precipitated by

antagonists, do not appear to persist for prolonged periods and have not been shown to be conditioned to environmental stimuli."

Now, you were explaining that to His Lordship this morning, but you -- and I don't think you completed the story and that's why I want to do it now. You suggested there was an article by Abrams to the contrary. What I want to do is get that reference from you. I wondered if you could indicate which article by Abrams...

10 A- Yes, I...

Q- ....because I think you then referred to your report, but didn't complete the answer?

A- In Abrams, nineteen eighty-six (1986)...

Q- Well, that's -- you're looking at your report, page...

15 A- Page twenty-four (24), my report on the role of nicotine.

Q- Right.

A- At page twenty-four (24) there's a -- an Abrams article entitled: "Roles of Psycho-Social Stress, Smoking Stress and Coping with Smoking Relapse prevention".

20 Q- Which is published in?

A- Health Psychology. And...

Q- What's the view that Abrams takes to say...

A- Well, I believe there's evidence in that article that shows conditioning to environmental stimuli.

25

Q- And what do you understand that to mean from this article?

A- Well, that cues related to smoking were able to have effects on the heart rate, for example, in people who were trying to go without cigarettes.

THE COURT:

However, in the article RJR-166, there is a reference to Abrams and a further article by Abrams in nineteen eighty-seven (1987) dealing with the same subject.

A- It seems to be...

Me IRVING:

Volume 6, rather than volume 5.

A- Yes, it's -- I'm not sure what the difference between -- the difference between those two (2) reports are. I don't know if they're on the same data set or not.

Me EVRAIRE:

Q- Have you considered the article as the first reference in the RJR-166?

A- Pardon me?

Q- Have you looked at the article in virtue of this point of...

A- I don't recall it in detail.

Q- Okay. If I might have just one brief moment?

THE COURT:

Do you want me to get up? Do you want me to get up?

Me EVRAIRE:

No, no, no, no. Just a brief moment.

Me BAKER:

My Lord...

5 Me EVRAIRE:

Perhaps two (2) minutes. The outdoor process maybe  
might be helpful.

SHORT RECESS

10

Me EVRAIRE:

I rise to say that I have no further questions.

Me IRVING:

15

My Lord, I don't -- I don't have a question but if I  
might be permitted, just in view of the -- Your  
Lordship's question which was raised. I would just  
direct the Court in the article to page three hundred  
and seventy-four (374) -- we should do this while the  
witness is still here -- where there is a heading  
20 "Conditioned Withdrawal", and for each conclusion you  
will find in the body of the article a discussion.  
"Conditioned Withdrawal" starts at three seventy-four  
(374), and at the bottom of that page, you will see the  
last sentence begins:

25

"In some smokers HR ...



-- which is heart rate --

"... appears to decrease with the presentation  
of the smoking cue. Abrams et al, 1987,  
Niaura et al in press. Although this result  
5 suggests a conditioned withdrawal effect,  
studies of these effects have failed to employ  
proper control groups of non-smokers,  
ex-smokers or smoking smokers. Thus an  
ambiguous interpretation of these findings is  
10 not possible."

I won't read on but that, My Lord, is the basis for the  
conclusion later so that if my friend wanted to ask...

Me EVRAIRE:

As I say...

15 Me IRVING:

... and I think you'll find it's the same article, My  
Lord.

Me EVRAIRE:

Well, I will make my own gratuitous editorial comment  
20 and note that that's not the same article that Dr.  
Kozlowski has referred us to.

A- Could -- could I make one (1) comment about that?

THE COURT:

Yes, go ahead.

25 A- The...

Me EVRAIRE:

We're here to help the Court.

5 A- I think -- I think the -- one (1) of the ways I would  
emphasize Dr. Hughes' statement in twenty-one (21) is  
that he doesn't believe there's solid evidence on these  
points which is, I think, not to be confused with the  
statement that such is not the case. That, for example,  
it took a number of years to discover the -- the proper  
conditions to have animals self-administer nicotine and  
10 the -- but now that one knows the procedures to use,  
it's -- it's a dramatic phenomenon and that the -- I  
think that he's -- he's really saying that...

THE COURT:

Proof is the...

15 A- ...the evidence is not here on this -- on these points.  
Not that it's not the case -- not that it's been  
established that these things aren't true, but I think  
it's a question of emphasis.

Me IRVING:

20 Just that it hasn't been established if they are true?

A- Yes.

Q- Yes.

Me EVRAIRE:

25 Or that they're not true. Well, ça va de soi.

Me POTTER:

Or that they might be.

Me BAKER:

My Lord, why don't you have the last word.

5 THE COURT:

Well, I want to thank you very much, Doctor Kozlowski,  
to have come back with that short notice again and we --  
we can free the witness?

Me IRVING:

10 Yes, My Lord.

THE COURT:

So you're free to go, and good luck.

A- Thank you.

15 AND FURTHER DEPONENT SAITH NOT.

In the year of Our Lord, nineteen hundred ninety (1990), on  
this fourteenth (14) day of March, PERSONALLY CAME AND  
APPEARED:

5 ROBERTA FERRENCE, forty-seven (47) years of age, residing at  
[DELETED]

10 WHO, having made a solemn affirmation, doth depose and say as  
follows:

Me EVRAIRE:

15 My Lord, I should note that it should be an offence  
under Quebec Law to ask a lady her age when she's  
starting to testify.

THE COURT:

Don't be so sexist.

EXAMINATION BY Me PAUL EVRAIRE,

20 On behalf of Respondent:

Q- Dr. Ferrence, I understand you have provided us with a  
curriculum vitae, and do you have a copy of that before  
you?

A- Yes, I do.

25 Q- All right. My Lord, in light of comments my friend made

about not challenging Dr. Ferrence's qualifications, I will be very brief with her c.v., but I would like just to put a few questions to her.

Doctor, I understand that you obtained your Ph.D. in nineteen eighty-eight (1988) from the University of Western Ontario?

A- Yes, that's true.

Q- And in which discipline?

A- In epidemiology.

Q- And very briefly, what was the topic of your thesis for your doctorate?

A- The topic of my thesis was the diffusion of cigarette smoking.

Q- And what do you mean by diffusion?

A- Diffusion refers to the spread of a behaviour or a technique or a product in a population over a period of time and it also includes discussion of what kinds of people start using a product. It's early and what kind of -- which people use it later and so forth?

Q- Right. Now, you are presently employed, as Dr. Kozlowski is, at the Addiction Research Foundation in Toronto.

A- Yes.

Q- Is that correct?

And what is your current position, Doctor?

A- I'm a scientist in the Prevention Studies Department.

Q- Maybe we all have an assumption of what that means, but could you explain to us what the Prevention Studies Department principally deals in?

5 A- This department, our work focuses on studies of patterns and trends of alcohol, tobacco and other drugs and also on policy matters pertaining to addictive substances.

Q- And has your work concentrated in any particular area in the time that you've spent with the Addiction Research Foundation?

10 A- Most of my work has concentrated on patterns and trends of tobacco and alcohol and other drug use.

Q- Right. And I note that as we will file your c.v. it lists the numerous publications you have participated in, but also at page nine (9) of your c.v. I note that you are an editorial consultant for, among others, the Canadian Journal of Public Health.

15 A- Yes.

Q- And the Journal of the American Medical Association, is that correct?

20 A- Yes.

Q- And I note also that you cite as one of your editorial consults, the nineteen eighty-nine (1989) report of the Surgeon General on smoking and health. What role did you play in consulting on that report?

25

A- I reviewed materials that had been written for the report.

Q- In which particular area?

A- In the area of patterns and trends of smoking behaviour.

5 Q- All right. And, My Lord, I'll just point out that in the report which I will be filing, there were two (2) pages of biographical notes...

THE COURT:

Yes.

10 Me EVRAIRE:

...which also I will be referring to very briefly.

Q- Doctor, I note that you are on the faculty of the Department of Preventive Medicine and Biostatistics at the University of Toronto and have been so since  
15 nineteen eighty-eight (1988)?

A- Yes.

Q- Right. And also on the faculty of the Department of Sociology at Queen's University, is that correct?

A- Previous to that I was.

20 Q- All right. And that was from the period of nineteen eighty (1980) to eighty-eight ('88)?

A- Yes.

Q- All right.

A- That is correct.

25 Q- My Lord, those are all the questions I'd wish to put to



Dr. Ferrence with respect to her expertise.

THE COURT:

Are you giving a number to her c.v.?

Me EVRAIRE:

5 Yes, please. AG-187. Thank you.

THE COURT:

Any questions on the expertise of Dr. Ferrence?

Me IRVING:

No, My Lord.

10 Me POTTER:

No, My Lord.

THE COURT:

Dr. Ferrence, you're qualified as an expert in your field of expertise.

15 A- Thank you.

Me EVRAIRE:

Q- Well, just to be clear about your field of expertise, in describing your professional -- your profession, you refer to yourself as a what, Doctor?

20 A- An epidemiologist.

Q- All right. And I wish to confirm with you that you have, in fact, at the request of the Attorney General of Canada, prepared a report which is before you, entitled: "Trends in Tobacco Consumption in Canada, 1900 to 1987," is that correct?

25

A- Yes, that's correct.

Q- I would ask that we mark this as the next AG exhibit.

THE CLERK:

AG-188.

5 Me EVRAIRE:

Thank you.

Q- Now, Doctor, just a few questions with respect to your  
report. Firstly, can you assist the Court in an  
understanding of whether smokers in Canada are smoking  
10 fewer cigarettes per day now compared to past custom?

A- No, that is not the case. Even though fewer people in  
Canada are smoking, those smokers who continue to smoke  
have not decreased their average consumption in recent  
years. For many years it was increasing, and the last  
15 few years it has levelled off, but we haven't seen any  
evidence that there has been a decrease.

Q- Let me ask you, Doctor, what are the -- let me use the  
expression "tools of the trade" -- that you rely on in  
studying trends of smoking in Canada?

20 A- Primarily, I rely on large data bases from some of the  
major health surveys that have been conducted in Canada  
and the United States.

Q- When was the last one in Canada?

A- In nineteen eighty-six (1986).

25 Q- Right. And what other resource materials might you rely

on?

A- I would rely on analyses done by other scientists in the field on smoking behaviour.

Q- Right. Do you do some of your own original research or studies or create, in that sense, a body of work that you rely on yourself?

A- I haven't done much in the way of actually collecting primary data, but secondary analysis of data is research. It's a different type of research, but you are creating new information from facts that other people have collected.

Q- Okay. Are women more likely than men to smoke in Canada?

A- No. Despite what we read in the press, smoking among women is still lower than it is among men. Among young women, in some age groups and some surveys, rates have been recorded that are slightly higher in recent years, but in most of the major health surveys there hasn't been much of a difference in young people. At older ages there still is quite a substantial difference, with men having higher rates.

Q- You say, as is commonly believed, do you accept that there seems to be a perception that you speak to about women smoking more than men?

A- There seems to be a perception that women -- that rates

of smoking among women are increasing and that women smoke more than men, but this is not the case.

Q- And perhaps lastly you could touch on the differences of smoking patterns across Canada. Are they the same, are they different?

A- They vary quite a bit. And I should point out that this is a transitory occurrence. At certain periods in history they have been fairly similar and at other period they've been very different. At this point, Ontario and B.C. have the lowest rates of smoking.

Q- M'hm.

A- And areas such as Quebec and the Maritime provinces have the highest rates of smoking.

Q- All right, Doctor. I thank you. Those are all my questions.

Me IRVING:

It won't be very long, My Lord.

THE COURT:

Oh, I thought you were leaving.

Me EVRAIRE:

That's what Dr. Ferrence hoped.

CROSS-EXAMINATION BY Me COLIN K. IRVING,

On behalf of Petitioner, RJR-Macdonald Inc.:

Q- Dr. Ferrence, you have your report in front of you. I'd

like to direct your attention to page three (3) first of all.

THE COURT:

Last paragraph. I have a question on the last paragraph.

Me IRVING:

Thank you, My Lord.

THE COURT:

But again, I don't want to bother you.

Me IRVING:

Q- We have heard something like what you say here before, Dr. Ferrence. Do I take it it's your evidence from what I read here that there was a big increase in smoking incidence at the time of the war and in respect of people who were involved in it?

A- Yes, that is the case.

Q- M'hm. And in looking at studies from other countries and data from other countries, have you satisfied yourself that that, in fact, is a phenomenon which you could see in countries other than Canada as well?

A- As far as I know, the documentation isn't as good for other countries, but during the period of the Crimean War, for example, smoking became more prevalent in the U.K.

Q- M'hm. And we have had from Sir Richard Doll some data

about smoking prevalence in the U.K. in this century, which seemed to indicate that there was a very sharp increase at the time of the First World War. Are you familiar with that as well?

5 A- Yes, I am.

Q- And again at the time of the Second World War, smoking rates went way up.

A- They did among women. By that point, they were fairly high among men and there wasn't a large increase, except perhaps among very young people.

10 Q- Now, also in page three (3) there is reference to the percentage of women smoking -- and may I take it from what you say that the real growth in smoking incidence among women took place in the nineteen twenties (1920s), between the twenties (20s) and the beginning of the Second World War?

15 A- Yes, it occurred later than it did for men.

Q- Yes.

A- Rates didn't really become very substantial until the nineteen thirties (1930s) and forties (40s).

20 Q- That was at the time, was it, when, I think what they used to call, forgive me, emancipation was taking hold, it became stylish for women to smoke?

A- Not necessarily. I mean, during the nineteen twenties (1920s) -- we read about that, but it's not clear how

25

well-documented it is -- smoking among women began to increase during the nineteen twenties (1920s) and I think there are other factors besides. I think emancipation is a rather vague term. I think one would want to talk about women during the war becoming involved in the labour force and being exposed to...

Q- Yes.

A- ... more external influences.

Q- All right. Were there any other major factors that you would want to add to that? The role of women was changing then anyway, wasn't it?

A- To some extent, yes.

Q- Yes. Now, you wrote your doctoral -- I'm sorry, My Lord, there is -- while we're at page three (3), if Your Lordship had a specific question about...

THE COURT:

No, no, go ahead. Go ahead. Go ahead.

Me IRVING:

... before I leave it? I'm reading it with great curiosity. It should not be a question which occurs to me as well.

THE COURT:

I knew I would. Go ahead.

Me IRVING:

Q- You wrote your doctoral dissertation on -- doctoral



thesis, I should say, on a diffusion model. Is that a roughly accurate description of the subject matter?

A- I applied a diffusion model to study smoking patterns.

Q- Okay. And is that what's referred to at page sixteen  
5 (16) of your report, in the first paragraph, about halfway down, it says:

"These patterns fit a diffusion model that describes the spread of new behaviours and products."

10 A- Yes, that's correct.

Q- All right. If I understand the theory correctly, it is your view that, say with a new product, that the higher socioeconomic levels of society generally, those with more money, more active communications and less  
15 conservative in nature, will be the first to get into using that product?

A- Generally, that's the case, yes.

Q- Yes. And will also be the first to get out?

A- Yes.

20 Q- Whereas people with less money, with less education, slightly more conservative perhaps, will get in later and will get out later?

A- In general, that's the case.

Q- Yes. And that's true, in your view, for consumer  
25 products generally, is it?

A- In general, that would be the case, although there could be other circumstances that would affect it, depending very much on the product...

Q- Yes.

5 A- ... and the source of it.

Q- And you apply that theory to cigarettes?

A- Yes.

10 Q- Yes. Would I be wrong in thinking, Doctor, that your diffusion model more or less parallels the life cycle of products as they come into the market, become more and more popular and then start to become stable and then decline?

15 A- With some products, they become stable, their use becomes stable and then declines. With other products, they don't. They keep on at their peak level. So that it depends very much -- whether there is a decline or not depends very much on other factors.

20 Q- In the case of cigarettes, thinking of the life cycle of cigarettes, incidence has gone up and up and up for the reasons you've given and then it leveled off and now, if I'm not mistaken, it has substantially and consistently declined in Canada for some years now. Is that not so?

A- That is true.

25 Q- M'hm. So that would be an example of the life cycle of a product which reached stability, maturity, and then

began to decline -- and that would fit your diffusion model, wouldn't it?

A- Yes. I'm concerned about the term "life cycle". That implies that it's a natural phenomenon. I think in the case of tobacco, there are other things that intervened in what might have been a stable situation.

Q- But it is a fact, is it not, Dr. Ferrence, that for quite a variety of consumer products, a life cycle such as that which I have described is in fact followed. The products are introduced, the word of them gets around, they become popular. The group that fits your diffusion model enthusiastically gets into it but as time goes on, once everybody knows about it, once the -- everybody is into the product that's going to get into it, stabilizes and then very quickly there is a decline?

A- Yes.

Q- Yes, and that is, in fact, precisely what's happened with cigarettes?

A- Yes.

Q- And it is your evidence that in the case of cigarettes the people with more education and more money, that very group who, by your theory gets in first, are the ones who are now out and the people who are still using cigarettes tend to be from the lower educational levels, the lower socioeconomic levels, is that true?

A- Yes, I'd emphasize "tend to be" but the...

Q- Oh, yes.

A- ...current rates of smoking are much higher among lower socioeconomic groups, yes.

5 Q- That's right. Your average university professor is much less likely to smoke cigarettes than your average high school drop-out at the moment?

A- That is true.

10 Q- But if a professor does smoke, he's likely to smoke a great deal?

A- Compared to twenty (20) or thirty (30) years ago, yes.

Q- Now, at page twenty-nine (29) of your report you deal with regional differences, and in paragraph B at the bottom of that page, you say:

15 "Regional differences are sizeable, ranging from a low of 22% in B.C. to a high of 34% in Quebec, Table 6."

Then you add in parenthesis.

20 "(It is interesting to note that B.C. law prohibits the advertising of cigarettes. While the law is not fully enforced, billboard advertising at least is effectively banned.)"

When was that law enacted, Doctor?

A- I'm not sure which year that was enacted.

25 Q- I see, so you will not, then, have studied the data

which show the rate of decline in B.C. before there was ever such a law?

A- No, this was put in as an aside and I said it was interesting to note, it wasn't a major point in my argument.

Q- Were you asked by someone to put it in as an aside?

A- No, I was not.

Q- Okay. So -- but to answer my question, you don't know, do you, Doctor, whether the rate of decline in British Columbia was greater or less or the same before the ban than after the ban because you don't know actually when the ban came in?

A- Not exactly.

Q- No; and it is a fact, isn't it, Dr. Ferrence, that in the United States there are regional differences and that on the West Coast you find prevalence at its lowest?

A- That is true.

Q- Yes; and there is no ban on any form of advertising in the Western United States, is there?

A- Not that I know of. This is -- this is why I said it was interesting to note.

Q- You draw no conclusions at all from it, do you?

A- No definitive conclusions.

Q- No, okay. Now, on this subject of regional differences,

I think you have noted somewhere in your report that the prevalence in Quebec is higher than in any other province, is that so?

A- That is true.

5 Q- Why is that?

THE COURT:

It's true?

A- Yes, that is true.

Me IRVING:

10 Q- Yes; and do you attribute the high rate of smoking in Quebec to higher rates of smoking among Francophones?

A- That is largely the case.

Q- That's what you say at page thirty-two (32) of your report:

15 "The high rate of smoking in Quebec ..."

A- Yes.

Q- "... is largely attributable to higher rates of smoking by Francophones".

A- Yes.

20 Q- Has that got anything to do with psychosocial factors, Doctor?

A- It probably has to do with a number of factors. I think it's a complex issue and it's something I'm doing some research on this year that I'm just beginning. Would  
25 you like me to elaborate on...

Q- Well, I was going to ask you about this article which we were looking at a few minutes ago. Let me do that, you'll have every chance to elaborate if you like. So you were one (1) of the authors, were you not, of the article entitled "The Future of Tobacco Use and Smoking Research"?

A- Yes, I was.

Q- It's Exhibit RJR-168. Let me ask you, Doctor, if you look at page three -- three forty (340), I'm afraid -- just a moment. We're not looking at the same -- you have the manuscript copy, I think...

A- Yes, I do.

Q- I have the published version. It was put in in that form. It is the same article but the paging will be different. I want to draw your attention to page three forty-one (341), first of all. In the second paragraph, beginning at the second sentence. Now, let me begin at the beginning of the paragraph so that we have it in full context. It says:

"Increasingly, the behavioral characteristics of those who continue to smoke are likely to be perceived as abnormal by non-smokers."

Then it goes on:

"Smokers are reported to have greater anti-social tendencies including belligerence,



psychopathic deviance, misconduct,  
rebelliousness, defiance and  
disagreeableness."

5 And then there are a series of references. Now, do I  
read that correctly as being in the present tense, that  
this is smokers now? Those who smoke are reported?

A- The present tense is usually used by scientists when  
referring to what is in the literature even if it was  
written fifty (50) years previously.

10 Q- Okay, so the opinion that is being expressed here is  
that according to the literature, whatever it is?

A- As you can see, all the references...

Q- Yes.

A- ...cited are from the nineteen seventies (1970s).

15 Q- All right.

A- It doesn't mean that this is necessarily the case today  
but it was reported at that time based on studies  
conducted prior to those dates.

20 Q- I see; and then, if you'd look at page three forty-three  
(343) for a moment...

THE COURT:

Which page?

Me IRVING:

Three forty-three (343).

25 Q- There's a heading "Smoking as Psychopathological

Behaviour".

"As smoking declines, smokers will increasingly be viewed as psychopathological. Research suggests that smokers are more likely to be anti-social and neurotic, have a history of adolescent rebelliousness or deviance, be impulsive risk takers, come from troubled families and have parents who smoke. This negative social profile will be exacerbated by the tendency of these smokers to smoke heavily use other drugs and associate with other smokers."

Has that got something to do with regional differences in smoking prevalence, Doctor?

A- Not directly. When we're talking about regional differences, we're talking about patterns that are changing over time. We're talking about lags between rates of smoking in one area and another area. When we're talking about psychopathological behaviour, we're talking about smokers per se. This would not mean that regions with higher rates of smoking, that those smokers would be more deviant.

Q- Well, if you had one (1) demographic group that had one (1) rate of smoking and another demographic group that had another rate of smoking and if what you say here is

true, that smokers are more likely to be all these wonderful things...

A- M'hm.

Q- ...wouldn't it necessarily follow that in the demographic group that had the higher rate of smoking, more people would -- be correct to be...

A- You would tend to have a higher rate, yes, of these characteristics.

Q- I see. So that if you found such a result in one (1) part of the country, say in one (1) province, it would follow, wouldn't it, that that was in one sense, at least, in a major sense, a local problem involving all these issues which -- which you have raised here and which would have to be dealt with in part by whatever it means, trying to deal with those problems, wouldn't it?

A- Can you repeat that again?

Q- I think what I'll do is withdraw it.

A- Okay.

Q- Dr. Kozlowski, in answer to a question, said that he preferred not to use the term psychopathological. Do you share that view?

A- It's not a term I'm really crazy about.

Me BAKER:

No pun intended.

Me IRVING:

Q- Is that, perhaps, because it's a decidedly pejorative term?

A- I think that would -- I would agree with that.

5 Q- Which is why the American Psychiatric Association has dropped all use of it, is it not?

A- That may be the case.

Q- Do you not know that?

A- No, I don't know that.

10 Q- Doctor, do you know from your research -- I asked Dr. Kozlowski this -- how many Canadians have quit smoking in the past two (2) decades?

A- I don't know the precise number of people, no. We have survey data that indicates the proportion of people in the population who are former smokers, which is not exactly what you wanted to know.

15 Q- If I said to you that for every three (3) people one is a smoker, one is a former smoker and one is a never smoker, would you accept that?

20 A- That's not exactly correct, but that is roughly correct.

Q- Close enough.

THE COURT:

Well, what is the exactly correct figure?

A- If you can give me a moment, I can...

25 Q- Because you're the one that's -- may as well ask you if

anybody.

Again, Mr. Irving, you may withdraw the question,  
but I will ask it anyway.

A- In nineteen eighty-six (1986)...

5 Q- Yes.

A- Should I proceed?

Q- Yes.

A- Of the total population aged fifteen (15) and over in  
Canada, forty-four point four percent (44.4%) never  
10 smoked, twenty-two point nine percent (22.9%) formerly  
smoked.

Q- Twenty-two point nine (22.9)?

A- Yes.

Q- Former?

A- Former smokers. Twenty-eight point two percent (28.2%)  
were currently regular smokers, which means they smoked  
pretty well every day. Three point zero percent (3.0%)  
were occasional cigarette smokers, which means that they  
smoked less than daily, and one point five percent  
20 (1.5%) smoked only pipes and/or cigars.

Q- One point (1.), I'm sorry?

A- One point five percent (1.5%).

Q- Pipe and cigars.

Me EVRAIRE:

25 I wonder if Dr. Ferrence might just note the page she

was reading from for the record.

A- Yes. Sorry, that's page twenty-five (25) of my report.

Q- Thank you.

5 A- Table 3. The figures I was reading were the top line of  
the table. So you can see that in nineteen eighty-six  
(1986) actually the largest proportion of people had  
never smoked.

Me IRVING:

My Lord, those are all my questions for this witness.

10 THE COURT:

Maître Potter?

Me POTTER:

Yes.

15 CROSS-EXAMINATION BY Me SIMON POTTER,  
on behalf of Petitioner, Imperial Tobacco Limited:

Q- Dr. Ferrence, these statistics that you've just given,  
the nineteen eighty-six (1986) ones, do you have any  
more recent than that?

20 A- No, I don't.

Q- And where do they come from?

A- These come from the Smoking Habits of Canadians survey  
which is part of the Labour Force survey.

25 Q- And do you treat those statistics as reliable and do you  
use them in your work?

- A- I use them in my work, but I am aware that they do underestimate smoking in Canada.
- Q- Okay. Now...
- A- But they're the best we have.
- 5 Q- All right. Now, since nineteen eighty-six (1986), when you had twenty-three percent (23%) ex-smokers and twenty-eight percent (28%) current smokers, what do you think has happened to those two (2) numbers. Have they come closer together or gone further apart?
- 10 A- I don't know. You're comparing former smokers and current smokers?
- Q- That's right.
- A- I would suspect that they have come closer together, but I don't have any documentation to base that on.
- 15 Q- All right. And the forty-four percent (44%) of never smoked, that is to say the people who had never been a regular smoker.
- A- Yes.
- Q- In fact, they've never been an occasional smoker.
- 20 A- Yes.
- Q- Is that what that means?
- A- No, it means that they've never smoked regularly.
- Q- They've never smoked regularly.
- A- Yes.
- 25 Q- Before nineteen eighty-six (1986), was that percentage



figure showing a trend upwards or downwards?

A- Upwards, I believe.

Q- M'hm. And since eighty-six ('86), do you know whether it's gone up or down or do you have an expert's guess?

5 A- I don't know that. I cannot document it, but I imagine that it has increased.

Q- It has increased since nineteen eighty-six (1986). And what about picking that percentage but in a particular age bracket, let's say from fifteen (15) to twenty (20).  
10 Can you tell us what happened before eighty-six ('86) and since eighty-six ('86)? Was that a growing number?

A- Before eighty-six ('86), according to the national surveys, which as I mentioned, are the best data we have, there has been an increase in the proportion who  
15 have never smoked, but I should add that we certainly are aware that not only is cigarette smoking under-reported generally, but it is very likely that it is under-reported even more by young people.

Q- But that under-reporting would have been there before  
20 eighty-six ('86) as after eighty-six ('86), wouldn't it?

A- That is probably the case, although we don't know if there has been an increase in under-reporting or not.

Q- No, but imagining under-reporting to have been of the same magnitude before and after, do I take it it's your  
25 expert's guess that the percentage of people who have

never smoked in the age bracket fifteen (15) to twenty (20), that percentage has been growing for several years?

5 A- Based on the population who are surveyed, which I should mention excludes people in institutions, excludes people on native reserves and people in the armed forces.

Q- With that qualification, is your answer yes?

A- Yes.

Q- M'hm.

10 A- To the best of our knowledge.

Q- Okay.

A- I should also point out that the people who are least likely to be surveyed are those who are most likely to be smokers. Kids who are living on the street, people with no fixed address or who are out all the time.

15 Q- And is that true now or has it been true -- was it true before eighty-six ('86)?

A- I think that's always been the case.

Q- It's always been the case.

20 THE COURT:

Q- Did you say to an answer -- I don't know if it's Mr. or you -- that the never smokers were those excluding all regular smokers, occasional smokers or former smokers or -- is that what you said?

25 A- I said that never smokers were those who had never

smoked...

Q- Never at all?

A- ... regularly.

Q- Well, are you sure of that? Don't take that as a  
5 criticism. I'm asking. Because when I look at the  
numbers, forty-four (44) would add up to twenty-two  
point nine (22.9), would add up to twenty-eight point  
two (28.2), plus three (3), plus one (1). It could  
probably come up to very close to a hundred percent  
10 (100%).

A- Yes, those figures should add to a hundred percent  
(100%).

Q- So therefore, if they add, never smoke is exclusive of  
occasional smokers?

15 A- Well, the people -- no, it would include -- never  
smokers would include former, occasional smokers, as far  
as I know.

Me POTTER:

Q- Now, the answer may be, Dr. Ferrence, that the  
20 ex-smokers include ex-occasional smokers?

26/0054 A- I believe -- I'm not a hundred percent (100%) sure of  
this, but I believe the question is: "Did you ever smoke  
regularly?".

THE COURT:

25 Q- Anyways, we would find that in the survey, in the Labour

Force survey.

A- Yes, it's actually somewhere in the...

Me IRVING:

RJR-77.

5 A- Would you like me to check on that?

Me POTTER:

We'll check it, Doctor. That's fine.

THE COURT:

We have it.

10 Me POTTER:

Q- Now, Doctor, the -- generally, I think it's true, isn't it, that the incidence of smoking has been going down in all age groups?

15 A- Yes, that is the case. The oldest group of women, it appears as if, in recent years anyway, that the rates have been going up slightly or have stabilized, but this is what we call a cohort effect in which it means that...

20 Q- They used to be in another cohort and they're now in the older cohort?

A- No, it means that a group who, say of women who were born during the nineteen twenties (1920s) were much more likely to take up smoking than women born, say between nineteen ten (1910) and nineteen twenty (1920) or an earlier group, and so that this reflects the adoption of

25

smoking back at the early part of the century. It doesn't mean that women over sixty-five (65) are suddenly taking up smoking at this point.

Q- So you agree that incidence generally has been going  
5 down in all age groups?

A- That is correct.

Q- And in both sexes?

A- Yes.

Q- And is the incidence going down fastest in the youngest  
10 age group?

A- It appears that that is the case. There isn't complete consistency among all surveys.

Q- Well, what's your view? Is it going down fastest in the fifteen (15) to nineteen (19) age group?

15 A- I'd have to make a qualified response to that. It appears on the basis of the survey data that this is the case, but we're not sure how much under -- if there is -- we're not sure of the magnitude of under-reporting in that age group compared to older age groups.

20 Q- In your thesis, you wrote:

"The overall rate of decrease in smoking was similar for both sexes and was greatest for those aged fifteen 15 to 19."

That was your...

25 A- Yes, based on the survey data, that's correct.

Q- And is that your view today, based on the survey data?

A- Based on the survey data, yes.

Q- Yes. Now, Doctor, you know those unfortunate  
characteristics which smokers tend to have and which  
we've seen in that article?

A- Yes.

Q- The sociopathic tendencies that they have. In your  
view, Doctor -- and you tell us if you don't know  
because this may be beyond your expertise -- what's the  
best thing to do? Is it -- if you stop them smoking,  
will they lose those negative characteristics or if you  
cure the negative characteristics, will they stop  
smoking? What is it?

A- I don't think I can answer that.

Q- Is it because it's beyond your expertise or no one  
knows?

A- I would say it's beyond my expertise. I'm not a  
clinician.

Q- Thank you.

THE COURT:

Q- Doctor, you wanted to check the survey? We'll give you  
the time to check.

A- Yes. On the survey of smoking habits nineteen  
eighty-six (1986), there is no page number here but it's  
document number 15.

Me IRVING:

RJR-77.

THE COURT:

RJR what?

5 Me IRVING:

77.

THE COURT:

77?

10 A- The question asked has the respondent ever smoked  
cigarettes regularly, so that the former smoker category  
would include only former regular smokers. So that  
former occasional smokers would be counted as never  
smoked.

Q- And what page do you think that's from?

15 A- There's no page number, but it's right at the end of  
number fifteen (15).

Q- At the end of the document?

A- Yes. It's the questionnaire for the survey of smoking  
habits.

20 Q- Ah, okay, a questionnaire. Okay.

A- After page sixty-seven (67).

Q- Questionnaire.

Me EVRAIRE:

25 Q- Which number? Question number? Just so His Lordship  
can find it.



A- Question number nineteen (19).

THE COURT:

Q- Okay, I see your point.

Me EVRAIRE:

5 Your Lordship, I have no re-examination.

THE COURT:

Thank you, Dr. Ferrence. And we can free the witness?

Me EVRAIRE:

Yes.

10 THE COURT:

You're free to go.

AND FURTHER DEPONENT SAITH NOT

THE COURT:

What's up for tomorrow?

Me EVRAIRE:

5 Our next witness is -- let me deal with -- our next  
witness is Dr. Trevor Hancock. I know that Mr. Cherniak  
is not here to examine him, so it would be inappropriate  
for us to proceed in Mr. Cherniak's absence.

THE COURT:

I guess Mr. Hancock is not here either?

10 Me EVRAIRE:

Well, that I know for sure.

Me POTTER:

No no, no no, My Lord. We can have Mr. Cherniak back.

Me IRVING:

15 Bring on Mr. Hancock, My Lord.

Me POTTER:

We're not ready to have gaps in the witness schedule.

Me IRVING:

Absolutely. No problem.

20 Me BAKER:

Well, Dr. Hancock is -- I'm sorry, I'm not sure I heard  
what Mr. Potter just said. He's not ready to have gaps?

Me IRVING:

Not if they can be avoided.

25

Me POTTER:

If we can avoid a gap, let's avoid it.

Me BAKER:

Maybe Mr. Potter would prefer us to spend two (2) days,  
waste two (2) days of the Court's time fooling around  
with chemical evidence from Dr. Castonguay, and we've  
agreed to pull Dr. Castonguay on an agreement. It's not  
for Mr. Potter to determine what gaps are going to be  
tolerated, it's for the Court to determine. We're  
trying to proceed as expeditiously as we humanly can.  
Hancock has been out of the country, he's coming back  
this -- he's just back. He's prepared to testify on  
Monday. Mr. Potter knows that we are trying to proceed  
as quickly as we can, so that kind of remark is  
unwarranted, that he's not prepared to tolerate gaps.  
My concern is for the Court's convenience, not Mr.  
Potter's.

Me POTTER:

My remark, My Lord, was addressed to the idea that Mr.  
Hancock couldn't testify because of Mr. Cherniak's  
absence.

Me BAKER:

Mr. Evraire was joking, and I think Mr. Potter should  
have known that.

THE COURT:

I didn't want to raise a...

Me EVRAIRE:

He knew it was a joke.

5 THE COURT:

I was just asking. I was in a joyous mood and just asking what was going on.

Me EVRAIRE:

We took the bait, yes.

10 THE COURT:

So...

Me EVRAIRE:

Dr. Hancock Monday morning.

THE COURT:

15 And tomorrow we have nobody?

Me EVRAIRE:

Unfortunately, regrettably on all sides. And Dr. Turcotte will be testifying after Dr. Hancock next week as well, in that order. We have the curriculum vitae for both of those witnesses for the Court if...

20

THE COURT:

Okay. How much time will we need for Dr. Hancock.

Me EVRAIRE:

My friends tell me they'll be about a day in cross-examination. The examination in chief will be

25

under an hour and a half for each of those. I speak for Dr. Hancock and maybe Maître Joyal could speak with respect to Dr. ...

Me JOYAL:

5 Maybe half a day.

THE COURT:

In chief? En chef, pour Docteur Turcotte?

Me JOYAL:

Oui.

10 Me POTTER:

Twenty (20) minutes with Mr. Hancock at the most.

Me IRVING:

And then Mr. Cherniak will finish Dr. Hancock by the end of the day, Monday, come what may, My Lord.

15 THE COURT:

So Dr. Hancock will be finished...

Me IRVING:

He will be finished on Monday.

THE COURT:

20 So Dr. Turcotte, we have half a day in chief.

Me IRVING:

He'll be finished on Tuesday, as I understand it, although that's not part of the case that I'm personally doing.

25

THE COURT:

I'm trying to be realistic.

Me IRVING:

Yes. No, no.

5 THE COURT:

So let's say Tuesday we finish Dr. Turcotte, who else  
could we line up? Whatever happened to Dr. Castonguay?  
Have you -- I don't want to raise another debate,  
just...

10 Me BAKER:

No, no. It looks as though there is a deal on the  
Castonguay report.

THE COURT:

So he won't take much time?

15 Me BAKER:

No time at all.

Me EVRAIRE:

It'll just be filed.

THE COURT:

20 Okay.

Me JOYAL:

J'ai une entente avec maître Pinsonneault. Je vais  
discuter de ça pour finaliser ça avec lui, de sorte  
qu'on n'ait tout simplement qu'à déposer le rapport  
25 devant la Cour avec son c.v.

THE COURT:

Vous pourrez faire ça demain. Comme ça, la journée sera bien occupée. On n'aura rien perdu. Again I'm in a joyous mood. Who else could we have next week?

5 Me JOYAL:

Peut-être un ajournement de cinq (5) minutes, Votre Seigneurie, pour nous permettre de...

THE COURT:

Oui. Je vais être ici dans le corridor, pas loin.

10

SHORT RECESS

Me BAKER:

15 My Lord, one of the witnesses we were to have called before the -- what we have, on our side anyway, called the second part of the case, which is, you know, the marketing part which is going to begin with Dr. Harris, was Dr. Laurent Marcoux who is on the witness list and for whom a witness -- a bilingual witness report has  
20 been delivered to the Court and to our friends. We are not going to call Dr. Laurent Marcoux as a witness, nor are we going to attempt to file his report, unchallenged or otherwise.

25 My best estimate, irrespective of what the combinations Mr. Joyal and my friend Mr. Evraire have



just told you, is that between Dr. Turcotte and Dr. Hancock, you'll be hearing evidence probably to the end of the day Wednesday. That is my best instinct. We would have possibly filled Thursday with Dr. Marcoux. We will not now be calling him. Hancock and Turcotte are the last two (2) witnesses in the first part of the case. We will then be commencing with Dr. Harris on the twenty-sixth (26th) of March. There are no other witnesses that can be called in the interim.

10 Me POTTER:

What about Mr. Tremblay?

THE COURT:

It's because we're losing -- we lost a day last week and next week we're going to presumably lose at least one (1) day if not two (2).

15 Me BAKER:

I appreciate that, My Lord, but in fairness to the situation, we were looking, when we were thinking of filler witnesses who could come in at any time, people like Dr. Castonguay who is now not going to be called, equally Dr. Marcoux. So, while yes, there will be a fallow day next Thursday, it is not something that we have designed deliberately, it has happened that way. We have withdrawn two (2) witnesses. Further than that I really have nothing to say on the matter, nothing that

would make any sense, and I can't help the situation.

Me IRVING:

My Lord, may I point out that Dr. Liston was meant to be the first witness for the Attorney General? Why can't we have him next week? I appreciate what my friend is saying, but my understanding from Mr. Cherniak is that he will be finished -- that the first witness next week, Hancock, will be finished on Monday, before the end of the day. This leaves open a serious possibility of having both Wednesday and Thursday. There is Dr. Liston who was supposed to be first and who we haven't heard from. There's Larivière who is -- Dr. Larivière.

Me POTTER:

On the question of world health.

15 Me IRVING:

World health. Why?

Me BAKER:

No, but hold on. It's just like, My Lord...

Me IRVING:

20 Well, but just a moment. Before... before...

Me BAKER:

... my friend saying yesterday that Mr. Wigle would be finished early in the day, he ran to four thirty (16H30). It may well be that Mr. Evraire is going to have Dr. Hancock in the box for four (4) hours Monday.

25

If you start at ten (10H00) and you take that to noon (12H00), he may not be starting to cross-examine till mid-afternoon. So it's very facile or easy for Mr. Irving to say: "Well, it's guaranteed that Dr. Hancock is going to be finished Monday afternoon." That excludes a re-examination, that excludes a lot of possibilities. So, you know, it's very clever, perhaps, to try and do a calculation to pin those two (2) down to finish by Tuesday evening, to try and artificially force the situation with witnesses who we'd prefer not to put in out of turn, but the order of our witnesses shouldn't be determined by Mr. Irving's guesses or his whims.

THE COURT:

I don't think -- we just avoid these things. I think the point that Mr. Irving is trying to make is that would that be possible and -- if it's not, tell me ...

Me BAKER:

No, it is not possible, My Lord.

THE COURT:

... to have Dr. Liston or anybody else.

Me BAKER:

No, it is not.

Me JOYAL:

Votre Seigneurie, c'est que le docteur Liston, s'il témoigne, peut... la raison pour laquelle on...

THE COURT:

Regardez, c'est mon jugement.

Me JOYAL:

5 ... a décidé de l'amener à la fin, c'est que ça peut  
donner lieu aux mêmes problèmes qu'avec monsieur  
Collishaw, les documents du Cabinet. Ça va être  
suspendu puis on va revenir. Alors j'ai pas à donner le  
détail de l'ordre des témoins. Larivière, c'est la même  
chose, compte tenu de l'audition au mois de mai.

10 THE COURT:

Bon, en tout cas. Alors si on reprend le vingt-six (26)  
avec le docteur Harris, on en a pour combien de temps  
avec Harris, en chef de toute évidence?

Me BAKER:

15 C'est très difficile à deviner, Votre Seigneurie. Je  
dirais au moins trois (3) jours.

THE COURT:

Trois (3) jours en chef?

Me BAKER:

20 Oui, au moins.

THE COURT:

Et qui va suivre? Parce que je vais lire les rapports  
entre-temps. Je vais m'occuper, moi aussi.

Me BAKER:

25 Pollay, Michel Laroche.

Me IRVING:

In this order now?

Me BAKER:

5 It's my best guess for the moment. Dr. Chandler and Dr.  
Joel Cohen. For purposes of clarification, My Lord, I  
don't know that from your own question one is to draw  
certain inferences. It is my clear view on the matter  
that until the cross-examination of Harris is  
complete, that there will be no witnesses between this  
10 examination in chief and the cross-examination that my  
friends are going to conduct.

THE COURT:

That's wrong. That's not what I said. I said if you  
put a -- you're perfectly well to put Harris on the  
15 stand on the twenty-sixth (26th) in chief, but  
cross-examination of Harris will not take place until  
the ninth (9th) of April, but that doesn't mean that I  
won't hear other witnesses. That's wrong.

Me BAKER:

20 Then I'd like to consider, if I may, Your Lordship,  
overnight what you have in mind, because it may cause a  
severe prejudice.

THE COURT:

25 Well, consider and let me know.

Me BAKER:

Yes.

THE COURT:

So we will adjourn till Monday.

5 Me POTTER:

My Lord, before we break, the prospects of going through  
this now week by week with perhaps a blank day in every  
week or every second week, it becomes very burdensome  
and time-consuming. In any normal case, a party is  
10 expected to have a witness to follow a witness when that  
witness has finished and the fact that this is a Charter  
case and a long case may excuse the occasional blank  
afternoon, or indeed a blank day from time to time, but  
I think that we can't go on from now until May, June  
15 and, if it goes on at this rate, September, continually  
having blank days.

I submit, My Lord, that we should find every  
possible way to keep the Attorney General's case rolling  
in on a good rhythmic basis. We've set aside four (4)  
20 days a week for the trial and I think those four (4)  
days ought to be used.

I don't say this in order to antagonize the other  
side, but only in order to say that I think we owe it to  
everybody, not only to the clients but also to the  
25 Attorney General, to the administration of the Court, to

keep the thing moving on a very good rhythmical basis and not simply to interrupt because there is suddenly no witness out of the fifteen (15) or sixteen (16) remaining witnesses who can come and fill up the day.

5 I submit that we cannot afford to have the blank days on a repetitive basis. We're now going to have another one, one this week, another one next week, by all accounts one the week following. We already have had in the previous weeks. I believe it gets to be too  
10 burdensome.

Me IRVING:

My Lord, I share that view. I appreciate the problem that arises when witnesses come from out of town, but this is not the first case where that has happened and  
15 people can make their arrangements. A Court case is a bit like tennis. Play is supposed to be continuous and I don't see why this can't be done here. However, I only rise to address the point that Mr. Baker just made. Mr. Baker said he wanted to think about something  
20 overnight because he felt he was being prejudiced, but I don't want to leave this whole issue hanging until next Monday. I understood the Court to make an order this morning, which the Court has jurisdiction to do, and that Dr. Harris is coming on Monday the twenty-sixth  
25 (26th)...



THE COURT:

No, I didn't order to have Dr. Harris ready. I say if he puts him in, fine, but cross-examination...

Me IRVING:

5 Well, if he puts him in. Mr. Baker now says he's going to put him in on the twenty-sixth (26th) but there's not going to be any other witness heard until the cross-examination has taken place, and Your Lordship said: "Well, that's not what I have in mind" and Mr.  
10 Baker gave the reply which you heard. I would like the Court to convene tomorrow morning, perhaps in chambers, because if Mr. Baker has some application, I'd like to get it out of the way tomorrow and not simply wait until Monday morning when more days will have gone by. May I  
15 suggest that if he thinks that some prejudice is being caused and he has some point he wishes to raise, that we agree to meet tomorrow morning so that the point can be made and not lose part of Monday arguing about it as well, since we're not sitting otherwise?

20 THE COURT:

It might not be a bad idea after all.

Me IRVING:

Shall we see you in chambers tomorrow morning?

THE COURT:

25 No, we'll...

Me IRVING:

Convene in Court?

THE COURT:

I'll be here tomorrow at ten (10H00).

ADJOURNMENT

C A N A D A  
PROVINCE DE QUÉBEC  
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SOUS LA PRÉSIDENTE DE L'HONORABLE JUGE JEAN-JUDE CHABOT, J.C.S.

No: 500-05-009755-883

RJR-MACDONALD INC.  
Requérante

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA  
Intimé

No: 500-05-009760-883

IMPERIAL TOBACCO LIMITÉE  
Requérante

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA  
Intimé

15 mars 1990 - Vol. 47

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LIST OF EXHIBITSPAGES

AG-189	Document: "Causes de décès - La Statistique de l'état civil, Volume IV, Selon les catégories détaillées de la Classification internationale des maladies - C.I.M., 1986"	7273
AG-190	Rapports sur la santé, 1989, Volume 1, Numéro 1, Statistique Canada, "Causes de Décès selon les catégories détaillées de la Classification internationale des maladies - C.I.M., 1987"	7273

L'an mil neuf cent quatre-vingt-dix (1990),  
ce quinzième (15e) jour de mars,

A COMPARU:

5 Me COLIN K. IRVING:

Pour la requérante, RJR-Macdonald, Colin Irving et  
Georges Thibaudeau.

Me SIMON V. POTTER:

Et pour Imperial, Simon Potter.

10 Me ROGER E. BAKER:

Pour le Procureur général, Roger Baker et Claude Joyal.

LA COUR:

Allez-y.

Me JOYAL:

15 Votre Seigneurie, j'ai obtenu les documents de  
Statistique Canada pour mil neuf cent quatre-vingt-six  
(1986) et mil neuf cent quatre-vingt-sept (1987). J'en  
ai remis copie à maître Irving et à maître Potter. Je  
pense qu'on pourrait les produire au dossier de  
20 consentement. Du moins, c'est ce que j'ai compris.  
J'ai remis les deux (2) exemplaires à monsieur le  
greffier, alors peut-être qu'on pourrait leur donner un  
numéro de pièce. Alors "Causes de décès dans la  
statistique de l'état civil, Volume 4, 1986".

25

LE GREFFIER:

AG-189.

Me JOYAL:

5 "Rapports sur la santé", c'est daté de mil neuf cent  
quatre-vingt-neuf (1989), mais c'est les chiffres de mil  
neuf cent quatre-vingt-sept (1987). Alors ce serait le  
document AG-190?

LE GREFFIER:

Oui.

10 Me JOYAL:

Alors simplement pour vous expliquer, ça liste toutes  
les causes de décès et non pas simplement un certain  
nombre.

LA COUR:

15 Juste un extrait, oui.

Me JOYAL:

Oui.

LA COUR:

Oui?

20 Me BAKER:

My Lord, considering what you said last evening, I'm  
prepared to propose the following schedule and list  
which, given the shortness of time that I've had since  
last evening, I can say is probably ninety-five percent  
25 (95%) accurate and one would hope that it would be a

hundred percent (100%) accurate. The week of the  
twenty-sixth (26th) of March...

THE COURT:

You have a confidence limit of ninety-five percent  
(95%).

Me BAKER:

We all do, My Lord.

THE COURT:

Okay, what week?

Me BAKER:

Twenty-sixth (26th) of March. Harris, the twenty-sixth  
(26th), the twenty-seventh (27th) and the twenty-eighth  
(28th). I'm assuming that he will finish at the end of  
three (3) days.

We will be prepared to go with Dr. Pollay, so  
blocking him in on the twenty-ninth (29th) of March.  
The second (2nd) of April, the third (3rd) and the  
fourth (4th), I should suggest, that should complete the  
direct, the cross and the re-examination, if any.

THE COURT:

Of who?

Me BAKER:

Pollay.



THE COURT:

Ah, Pollay.

Me BAKER:

5 His name is misspelled actually on your report. I think  
his name was spelled P O I L A Y. It's not Poilay, it's  
P O L L A Y.

THE COURT:

Oh. Okay, the second (2nd), third (3rd) and fourth  
(4th)?

10 Me BAKER:

Second (2nd), third (3rd) and fourth (4th) is Pollay.

THE COURT:

M'hm.

Me BAKER:

15 Thursday, the fifth (5th) of April, assuming that the  
above holds, Michel Laroche. I am assuming him to be a  
one (1) day witness.

20 On Monday, the ninth (9th) of April, Dr. Allan Best  
and the tenth (10th) of April, Dr. Allan Best. On the  
eleventh (11th) of April, Dr. Michael Chandler and the  
twelfth (12th) of April, Dr. Michael Chandler. That  
brings us to Thursday of that week. Now, as you know,  
Monday is a holiday.

THE COURT:

25 M'hm.

Me BAKER:

I am assuming Chandler to be a three (3) day witness, so he will return on Tuesday the seventeenth (17th) of April.

5           Now, my one question in this line-up, My Lord, is given that Monday is a holiday, do you intend to sit Friday the twentieth (20th)?

THE COURT:

10           If you wish so. If not, no. As you wish. I'm trying also to keep on schedule with what we've decided all together at the beginning of the trial. I know you need your Fridays.

Me BAKER:

Well...

15       THE COURT:

I'm trying to... but if you want me to sit, I'll sit. I have no problem with that.

Me BAKER:

20           Well, as you know, My Lord... well, as you don't know, but as it happens, that little circle of witnesses comes from quite far away, so let's assume for the moment that we will sit on Friday the twentieth (20th), but subject to reasonableness in respect of letting a witness go home for a long weekend.

25           So assuming therefore, or assuming then, that Cohen

will testify on Friday, the twentieth (20th), he will  
return on the...

Me POTTER:

I'm sorry. What happened to the eighteenth (18th)?

5 Me BAKER:

Oh, it just got lost in the discussion. The eighteenth  
(18th) and nineteenth (19th) is Cohen.

THE COURT:

Cohen.

10 Me BAKER:

Yes.

THE COURT:

And if need be, then the twentieth (20th).

Me BAKER:

15 Cohen four (4) days. So let us assume the eighteenth  
(18th), the nineteenth (19th), the twentieth (20th) and  
the twenty-third (23rd) for Cohen.

THE COURT:

Okay.

20 Me BAKER:

Leiss, the twenty-fourth (24th). I assume he would be a  
day and a half ( $1\frac{1}{2}$ ). Dr. Covell, that should bring us  
to the last week of April.

THE COURT:

25 Covell on the twenty-fifth (25th) and twenty-sixth

(26th)?

Me BAKER:

Or, depending on Leiss, of course, but that's the order.

So I'm ...

5 Me IRVING:

Well, Covell would be quite brief, I think, if there was  
a half ( $\frac{1}{2}$ ) a day.

Me BAKER:

10 That's -- but I'm not debating with you, Mr. Irving,  
whether she's brief or not. I'm giving the line-up now.  
I'm only giving my best estimates. That's it for  
April, My Lord, because I understand you're not sitting  
in May, and Monday is the first of May. I don't have  
the calendar in front of me, but I think that's fairly  
15 accurate, is it not?

THE COURT:

Yes. Yes. No, no, you're right. And I think we're  
resuming on the fifth (5th) of June, I believe.

Me BAKER:

20 I beg your pardon, My Lord?

THE COURT:

I think we're resuming on the fifth (5th) of June.

Me BAKER:

25 Well, then Dr. Harris will then probably be here on the  
fifth (5th) of June.

Me POTTER:

Excuse me. After the fifth (5th) of June and after Harris, do we have an order for the remainder of your witnesses?

5 Me BAKER:

Not today I don't.

Me POTTER:

And do we know who the rest of them are?

Me BAKER:

10 M'hm. You've got our list of experts.

Me POTTER:

Well, no, you mentioned to us the other day a mystery man.

Me BAKER:

15 No, I didn't mention a mystery man to you, Mr. Potter.  
In any event, My Lord, you asked for the schedule. I've made desperate attempts, as you can assume, in the last twelve (12) to fourteen (14) hours. That's the best I can come up with and that's the best I'm prepared to  
20 predict as of this moment.

THE COURT:

So that's eight (8). There's probably seven (7) remaining. Do you have something to say, Maître Irving?

Me IRVING:

25 My Lord, yes, I appreciate Mr. Baker's overnight work.

5 I wonder if I could ask, in respect of Dr. Harris,  
obviously, the three (3) days forecast in March are for  
the examination in chief, but for the others, we have  
Dr. Pollay marked down for four (4) days. I wondered  
how much of that, in Mr. Baker's estimate, is  
examination in chief and how much is cross-examination.  
Similarly for Dr. Chandler and Cohen. In those four (4)  
day estimates, I wonder how much time you're allowing  
for cross-examination and how much for examination in  
10 chief?

Me BAKER:

It's impossible to guess, My Lord, simply the way --  
just the way it's been impossible for my friends to give  
us accurate estimates of their expected  
15 cross-examination. I haven't scripted these witnesses.  
I'm using my best judgment at the moment.

Me IRVING:

Well, then, do I understand that four (4) days for Dr.  
Cohen is your estimate of examination in chief and  
20 cross-examination?

Me BAKER:

And re-examination. That's what I said, for all of  
them.

Me IRVING:

25 And re-examination. But you're not able to give us any

idea at all how much of that is examination in chief?

Me BAKER:

For the moment, that is correct.

Me IRVING;

5 Well, My Lord, that's...

THE COURT:

And in the event that a witness doesn't take four (4) days as scheduled, are you able to fill in?

Me BAKER:

10 I will try my best, My Lord, to have witnesses on a stand-by basis. I should tell you that not one of these witnesses is from Montreal, except Laroche. Harris is from Boston, Pollay is in British Columbia, Best is now in British Columbia, Chandler is in British Columbia and  
15 Cohen is in a little village somewhere in the middle of Florida, difficult to get in and out of -- Gainesville. Leiss is in British Columbia, Covell is in Toronto. So you will appreciate difficulties in respect of stand-by. And it's not simply a matter of airline reservations or  
20 the necessary spending of money. That's not the issue I'm speaking to. These people, as I'm sure you will appreciate, have full teaching commitments. It's not easy.

THE COURT:

25 I appreciate that. And under -- okay. I won't hold you

to this. I'm just trying to see. Of the remaining  
ones...

Me BAKER:

Then turn the microphones off.

5 THE COURT:

No, it's clear. Then if we want to check what we  
said...

Me BAKER:

I understand. I understand.

10 THE COURT:

...at least we all know what we said. Of the remaining  
witnesses that are not mentioned there, there might be  
some from Montreal or in the vicinity that could be...

Me BAKER:

15 They'll be much easier to fill in.

THE COURT:

To fill in, if need be.

Me IRVING:

20 My Lord, I would have a suggestion to make to the Court,  
really an application. Given what Mr. Baker has said,  
we find ourselves well into June with Dr. Harris just  
finished and several other witnesses still to be heard.  
The possibility of others arising out of the decision  
the Court of Appeal might make after hearing our  
25 interlocutory appeals in May. At the beginning of the



case, we had suggested that it would be most convenient, perhaps not only to the lawyers but to the Court if we only sat four (4) days a week to get the Fridays off, but given this timetable and -- and what I would submit is the importance of trying to get the evidence in this case -- the case concluded by the end of June before the summer recess. I wonder if the Court could give consideration starting in April to sitting five (5) days a week so that we could -- can deal with the witnesses who really do need -- need to be heard before -- before the end of June.

I fear that with this timetable, June will end and we will not have finished the evidence in the case, never mind argument. So I would ask the Court to give some consideration to that.

Me POTTER:

My Lord, I second that request and I say it without wanting to belittle at all the efforts made by Mr. Baker overnight. I think it's very nice to have a schedule with dates on paper and with the witnesses there. On the other hand, with these people coming from out of town and with Mr. Baker's promise, which is all he can give, he can't promise anymore, that he would just do his best efforts to keep witnesses available to fill in the gaps. It -- it seems to me very obvious that we're

going to be facing many more three (3) day weeks rather than four (4) day weeks and bearing in mind the fact that this year, as it expires, we're going to be facing new regulations on -- on -- new warnings which are under provisions attacked by Mr. -- by Mr. Irving. Now, the fact that people have to know how to plan out their lives and their businesses, I think it's important that we -- we sit those five (5) days a week.

I would have an additional suggestion as well, and I don't know whether this fits in the realm of possibility, but it seems to be more and more of a shame for this case to lose the month of May and I know that that is very difficult for you, My Lord, but I put on -- on the table, so to speak, the possibility of discussing some solution for us to be able to sit through May rather than waiting until June.

Me IRVING:

My Lord, I would enthusiastically second that. I had -- I had understood that that was not a possibility, but I'm sure all counsel would agree that we would see the Chief Justice, given -- given this timetable and I second what Mr. Potter said. I appreciate Mr. Baker's difficulties. I know these witnesses do come from out of town.

Would it be helpful if -- if counsel did see the

Chief Justice to point out that what has happened with large numbers of witnesses, many from out of town, blank days happening that we all feel this case may not end before the summer recess unless -- unless Your Lordship is freed up to hear us in May and see whether something couldn't be done to avoid that happening. I think we can make quite a persuasive case to the Chief Justice that it is not in the interests of justice that this case should be held over until the fall. That would be a much better solution than -- than my original five (5) days. If we could do it -- and I can only speak for myself, Mr. Baker will speak for him, but I would think that all counsel here would agree to -- to do that if -- if you think that anything might come of it.

15 THE COURT:

I -- we -- it's because you may not realize the enormous work that you're putting the Chief Justice in trying to reschedule the Judges. May is a very busy month in the Superior Court in all instances. The Chief Justice, the associate -- not the associate -- the juge en chef adjoint, I have sat with him a number of times to try to figure out. I have personally absolutely no problem if you try again with the Chief Justice but I'm not going to put any more pressure on him. He has done his very best to this day to accommodate us but, you know, I have

no problem but I want you also to make clear to the  
Chief Justice that I'm not pushing him.

Me IRVING:

We would tell him that.

5 THE COURT:

Because I -- you don't realize the trouble and work that  
this represents. Fifteen (15) judges around like this  
and...

Me IRVING:

10 But I think we could now approach him on the basis that  
with -- with the timetable, as it's been produced, that  
it is quite clear that the case will not finish in June  
unless we can sit in May, and I would see no harm, at  
least, in approaching him on that basis.

15 THE COURT:

Personally, I have no problem in sitting on the case in  
May, obviously. I, as well as you, want to get this  
case rolling. It's not easy to sit on one (1) case and  
not do anything else while there are other cases  
20 pending. But in order to be fair to Me Baker, I want to  
have your best estimates also of cross-examination of  
these witnesses.

Me IRVING:

My Lord, I can -- let me give you that now.

25

THE COURT:

You have -- you have to give him, too, some food.

Me BAKER:

I'd like to speak to the issue of the five (5) days. I  
5 mean, I've listened for a few minutes.

Me IRVING:

Could I answer the question that I was asked first?

Me BAKER:

10 Well, this is not a basketball game. I mean, they've  
spoken to the issue of the five (5) days. They've  
spoken to the issue of the issue of May. The question  
of the issue of May. Now, I would like to speak to the  
issue of five (5) days given that you raised that you  
want to be fair to Mr. Baker. May I do that?

15 THE COURT:

You will answer after.

Me BAKER:

20 My friends had a jolly good time through the fall with  
four (4) day weeks having ample time to prepare their  
witnesses, having the three (3) day weekends to prepare  
for cross-examination and examinations of other  
witnesses. This, I'm sure you'll appreciate, in terms  
of its content and the timing is the most difficult part  
of the case forming. I would suffer a severe prejudice  
25 if now we were to change the rules to accommodate Mr.

Irving's hurry to change things to a five (5) day hearing week rather than a four (4) day hearing week. I have planned the entire schedule, as it were, of working with witnesses in between other witnesses on the basis that I would have at least three (3) days every week, Friday, Saturday and Sunday. So I would urge you most strongly, My Lord, not to entertain that suggestion.

THE COURT:

Okay, do you want to address the question of May?

Me BAKER:

I've now turned the schedule upside down again since last evening and given that Your Lordship made no comment on it other than to say we are not to use you as a pressure point with the Associate Chief Justice, that's something that I will consider myself in the next twenty-four (24) hours or so and get back to my friends, and I say this to you respectfully, I don't submit that it's necessary for me to comment on that issue right now.

THE COURT:

No, just if you had anything to say.

Me BAKER:

Initially, I can tell you, that I was no less upset than my friends were by hearing that we wouldn't be sitting in May. It serves no purpose, certainly no purpose for



the Attorney General to have these extended delays. It served no purpose for us not to sit between early December and the end of February. There were other problems not caused by us. That caused us a prejudice in the line-up of our witnesses. So, in spite of the comments or the remarks made yesterday by Mr. Irving, our game is not to delay this to nineteen ninety-two (1992). It served no useful purpose for us to do it. I had one (1) duty to the Court today which was to give you a line-up of witnesses and to try and comply with the Court's needs and friend's wants. I think I've done both.

THE COURT:

Now, Me Irving, do you want to give us your best estimates?

Me IRVING:

My Lord, for Dr. Pollay -- I'm going to leave aside Harris for the moment because I'd like to talk to Mr. Potter about it. Dr. Pollay is down for four (4) days. He will be cross-examined by counsel for both of the applicants, but we are coordinating the cross-examinations so that there will not be overlapping. I would have been very surprised if cross-examination would take very much more than a day and a half ( $1\frac{1}{2}$ ) with Dr. Pollay.

THE COURT:

Okay.

Me IRVING:

5 For Dr. Laroche, which Mr. Thibaudeau will be doing,  
that is going to be extremely brief, not much more than  
an hour, My Lord.

Dr. Best, I must say at this moment, I'm not in a  
position to comment on. I can't remember what he says.  
I'll get back to you in a few minutes.

10 Dr. Chandler, as far as I'm concerned, would be a  
very brief cross-examination. I cannot imagine taking  
more than two (2) hours with him.

Dr. Cohen, my best guess is that the  
cross-examination might be a day and a half ( $1\frac{1}{2}$ ). That  
15 would be, I think, the outside.

Now, Dr. Leiss has written an enormous long report  
and is only down for a day and a half ( $1\frac{1}{2}$ ), from which I  
have presumed that basically he will be filing his  
report. That being the case...

20 Me BAKER:

Don't make that presumption.

Me IRVING:

Well, I presume, from when I am told a day and a half  
( $1\frac{1}{2}$ ) for examination in chief, cross-examination and  
25 re-examination on a report which is not much short of a



hundred (100) pages long, that the evidence is largely  
in the report. I was not -- I was not proposing a very  
long cross-examination of Dr. Leiss, My Lord. I think  
if you put down a day and a half ( $1\frac{1}{2}$ ), again just to be  
5 on the safe side, that would be...

Me POTTER:

A day.

Me IRVING:

A day? Perhaps one (1) day for Dr. Leiss between us.

10 Now, Dr. Harris is another matter and the problem  
is that I, of course, have not yet heard back from our  
own experts about the supplementary report that was  
filed yesterday, which raises a number of issues. I  
would think Dr. Harris' cross-examination would  
15 certainly take two (2) full days and may take a third  
(3rd) between Mr. Potter and myself, and again, we will  
be dividing that cross-examination between us.

20 So, the estimates which -- which have been given to  
you, four (4) days for Dr. Pollay may be not far off the  
mark on the assumption that there is to be a long  
examination in chief and not what we have seen in some  
cases, essentially filing a report.

25 If we're going to save time on this -- on this  
schedule that's been put forward, my guess would be that  
Dr. Pollay might well only be three (3) days instead of

four (4). There's a chance of a compression there.  
There might be some for Dr. Best, two (2) full days, I'm  
not sure about that. Dr. Chandler might only be two (2)  
days it would seem to me. Dr. Cohen with the  
5 possibility of saving a day. I put those forward just  
so the Court has -- and my friends have some idea where  
we think it's possible that...

THE COURT:

That's why we have this this morning.

10 Me IRVING:

Yes, yes. Where it's possible that the actual time will  
be a bit shorter than the forecast.

Me POTTER:

I agree, My Lord, with what Mr. Irving has just said,  
15 and I think the figures that he has given you really are  
global figures for cross-examination for both of us  
because we are trying not to double up and I would say  
for Best, it's hard to imagine more than two (2) hours  
of cross-examination on Best. As for Harris, I think  
20 that's a fair statement that both of us together ought  
to be able to do our job in two (2) to three (3) days.

THE COURT:

Okay. As to the question of four (4) days, I am not  
going to make a decision at this stage. We started out  
25 in four (4) days with the agreement of all the parties

5 as being a reasonable manner to proceed, and as long as  
the Court feels there is an effort on both parts to have  
the evidence put in as normally as possible, as is  
reasonably possible, I won't change the schedule if one  
of the parties feels that it would... the party would  
suffer prejudice. So we will leave the four (4) days as  
it is now and as I mentioned, I have no -- as long as I  
see good faith and good efforts, we will stick to the  
four (4) days.

10 Now, as to the question of May, I leave that up to  
you. I told you what my problem is and if you can do  
something about it, do it, if you wish to. If you don't  
wish to, that's -- that's life. I can't myself reassign  
my assignments, okay, so...

15 Me POTTER:

C'est compris.

THE COURT:

Anything else?

Me IRVING:

20 No, My lord.

6/0076

Me POTTER:

25 Well, that leaves next week. Next week, we still have  
Hancock and Turcotte and on the scheduling proposed to  
us last -- yesterday, we still have a blank day coming  
up next week.

THE COURT:

Two (2) blank days.

Me IRVING:

Two (2).

5 Me POTTER:

Even two (2) blank days, and I can't help repeating, My Lord, it's a great shame to see any blank days, and I wonder if we can't find someone, not Mr. Larivière, not anybody from the other side, not the mystery witness,  
10 not no one?

Me BAKER:

I thought, My Lord, I explained carefully yesterday what had happened and why there was going to be somewhat of a hole next week. I don't know that it's necessary for me  
15 to repeat myself. I am not going to be spiteful and say: all right, you want a blank day, Mr. Potter -- you want a full day, Mr. Potter, on Wednesday we'll give you Dr. Castonguay, and there will be no deal, or we'll pull the deal that was achieved between Mr. Joyal and Mr.  
20 Thibaudeau, or the same thing with pulling Dr. Marcoux. I think it would be, for us, nonsensical to put some witnesses in who otherwise we have now pulled for the sake of shortening things, but having tried to cooperate in that fashion, now to even have to respond to the  
25 suggestion that we put witnesses who my friend, with

great alacrity, names even, which I find quite astonishing, is unacceptable to us and is not fair.

We've done the best we can to start the second part of this case, as I told you yesterday, with Dr. Harris on the twenty-sixth (26th), and short of disasters there will be no further delay. I have no more to say on the subject.

THE COURT:

Well, we'll see next week. See you Monday, ten o'clock (10H00).

ADJOURNMENT

CANADA  
PROVINCE DE QUÉBEC  
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE

SOUS LA PRÉSIDENTE DE L'HONORABLE JUG.  BOT, J.C.S.

No: 500-05-009755-883

RJR-MACDONALD INC.  
*Requérante*

IMPERIAL TOBACCO LIMITÉE  
*Requérante*

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA  
*Intimé*

c.

LE PROCUREUR GÉNÉRAL DU  
CANADA  
*Intimé*

19 mars 1990 - Vol. 48

COMPARUTIONS :

Pour la requérante  
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M<sup>re</sup> GEORGES R. THIBAUDEAU,  
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Pour la requérante  
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Pour l'intimé  
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In the year of Our Lord nineteen hundred and ninety (1990),  
on this nineteenth (19th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

5 Me EARL A. CHERNIAK, Q.C.:

For RJR, Earl Cherniak and Michel Pinsonneault.

Me SIMON V. POTTER:

And for Imperial, Simon Potter.

Me PAUL EVRAIRE:

10 For the Attorney General, Roger Baker, Claude Joyal and  
Paul Evraire. My Lord, I call to the stand Dr. Trevor  
Hancock, please.

-----

In the year of Our Lord nineteen hundred and ninety (1990),  
on this nineteenth (19th) day of the month of March,  
PERSONALLY CAME AND APPEARED:

5   TREVOR HANCOCK, forty-one (41) years of age, residing at  
    **[DELETED]**

10   WHO, having made a solemn declaration, doth depose and say as  
    follows:

EXAMINATION BY Me PAUL EVRAIRE,

On behalf of Respondent:

15   Q-   Dr. Hancock, you have provided us and we in turn  
    provided the Court with your curriculum vitae. If you  
    would put that before you, I'll just have a few  
    questions with respect to your qualifications, sir. I  
    notice under the first page, degrees and academic  
    qualifications, that you obtained your Bachelor of  
20   Science from the University of London in nineteen  
    seventy (1970). Could you tell us in which discipline,  
    please?

A-   In Physiology.

25   Q-   All right. And obtained, as it's described, an MB, BS  
    from the St. Bartholomew's Hospital in London. I

understand, as you've instructed me, that that is the equivalent of an MD in Canada?

L/0094

A- That's right.

Q- And that, you obtained in nineteen seventy-three (1973) and that you also obtained your Masters of Health Science from the University of Toronto in nineteen eighty (1980). Could you just give His Lordship an idea of the types of studies or disciplines expanded upon in your studies of your Masters of Health Science?

A- Certainly. The Master of Health Science is a graduate degree with a number of streams and I was in the community health and epidemiology stream, which meant studies in Canada's health care system, in biostatistics in epidemiology, evaluation in the area of environmental health, health promotion, behavioral science and, of course, public health programming and public health planning.

Q- All right, thank you. If we just carry on -- and I won't go extensively throughout all of this -- but I would like to concentrate for a moment on your academic and professional positions. After you obtained your MB, BS in nineteen seventy-three (1973) at St. Bartholemew's, you then immigrated, I gather, to Canada in nineteen seventy-five (1975)?

A- That's right.

Q- And you became a family physician, as you describe it in your c.v., first in New Brunswick, then in the metropolitan Toronto area. Is that correct?

A- That's right, yes.

5 Q- By family physician, Doctor, what do you mean? What type of practice was this?

A- What used to be called general practice, family practice, such as general medicine practice, family practice.

10 Me EVRAIRE:

Your Lordship, I just note that -- and I will be referring to it as well -- Dr. Hancock in his report, which I will be filing, has a few biographical notes at the beginning.

15 LA COURT:

I've read the report.

Me EVRAIRE:

20 Q- And I'd like to make reference to those as well, Doctor, while dealing with your qualifications. I note from the shorter curriculum vitae that for a two (2) year period in the late nineteen seventies (1970s), you were an epidemiologist with the Peel Regional Health Unit, Peel being a region adjacent to Toronto, is that right?

A- That's right.

25 Q- And in the third paragraph on page one (1) of your

résumé in your report, let me just read the sentence at the end of that third paragraph. You say:

"During my time at Peel Region, I worked on a review and reorganization of the communicable disease control program, developed the first health status report for the region and undertook a comprehensive survey of women's childbirth experiences."

Let me ask you what you mean by your use of the expression "health status report for the region".

A- That's an examination of the mortality and, to the extent you have them, the morbidity patterns within the region, demography to some extent, social conditions. So all of the matters that pertain to the health of people in the region.

Q- All right. You then go on to indicate that after your graduation from the University of Toronto -- this is your Masters in Health Science ...

A- That's right.

Q- ... that you joined the newly formed, as you describe it, Health Advocacy Unit at the Department of Public Health, City of Toronto. Could you explain the purpose of the Health Advocacy Unit?

A- Well, the Health Advocacy Unit came into existence as a result of a report called "Public Health in the 1980s",

which was really a rethinking of municipal public health, and that report identified a number of weaknesses in the City of Toronto's Health Department, notably in the area of health planning, health data, research, information, education, community development and advocacy, and so the Health Advocacy Unit was created to fill those gaps.

Q- Just give us the understanding of the size of this unit.

A- There were about fifteen (15) of us.

Q- Other doctors besides yourself?

A- No, I was the only physician.

Q- All right. Then you indicate in the next paragraph that you were involved in a wide range of, as you describe it, public health policy and planning projects.

A- M'hm.

Q- And a little bit later in that same paragraph, you speak of your extensive work in the area of environmental health and ecotoxicity and I underscore the following words:

"... as well as in other major health issues, including tobacco, alcohol and so forth."

What initiatives, if any, did you take with respect to tobacco?

A- Well, the unit operated as a unit, so we would work together on a number of different programs. In the area

of tobacco, we were particularly involved in introducing and working for bylaws to control smoking, particularly in restaurants at that time, in developing community and school educational programs around the tobacco issue.

5 In other words, in a variety of measures, community measures and educational measures and legislative measures to combat the use of tobacco.

Q- How did you, as a physician, play a role in this particular initiative?

10 A- Well, my role there was as a health planner as well as a physician, and so my role was in terms of working on the evidence around tobacco and relationship to disease in -- in working on educational strategies, really, it's hard to sort of pick out a particular piece that I  
15 played because it's a -- it's a team effort very much, but it was in the joint working together to create the programs and the policies. So, a lot of it had to do with thinking through some of the policy issues, thinking through some of the program issues.

20 Q- All right. Page two (2) of your report, your résumé, you indicate that then in nineteen eighty-two (1982), you were appointed as an associate medical officer of health for the city's northern area. Is -- when you say medical officer of health, is that different or is it  
25 the same as a public health officer?



A- It's essentially the same. I -- a public health officer might be held to include a public health inspector for example.

Q- All right. In that position, you indicate -- two (2) paragraphs below or paragraph three (3) on page two (2) -- major contributions to the consents of health promotions and the new public health that was being developed, you mention, at Health and Welfare and the W.H.O. in Europe. Why were these important to you, what the W.H.O. was doing or what Health and Welfare was doing as a public health physician?

A- Well...

Me CHERNIAK:

I'm wondering what this has got to do with his qualifications -- why the World Health Organization was important to him? I mean World Health Organization, what has it got to do with whether he's qualified or not?

Me EVRAIRE:

Well, indeed, My Lord, this, as my friend Mr. Baker points out, it goes to the development of his thinking as a public health official. Indeed, as is pointed out in his c.v. that gave impetus to some of the work that he has, in fact, carried on.

THE COURT:

I thought you were in his qualifications as experts, not  
-- not on the merits of his report.

Me EVRAIRE:

5 Well, as I say, his thinking gave rise to certain of the  
projects that he undertook and it's my submission that  
those projects would give Your Lordship an idea of the  
scope of his public health expertise.

THE COURT:

10 Well, it's very well spelled out in his report, anyways  
proceed.

Me EVRAIRE:

Fine.

15 Q- Doctor, I note that after your particular sojourn with  
the medical office in the city of Toronto's northern  
health area, that you then took on some faculty  
positions, a short position at Berkeley in California in  
nineteen eighty-six (1986) but also some positions at  
20 York University and also at the Faculty of Medicine at  
the University of Toronto. Could you assist His  
Lordship with an understanding of the areas of your  
teaching?

A- Yes, at York University, which is where I teach a day a  
week at present and have done for the last four (4)  
25 years, I teach in environmental studies, which is a

graduate faculty, and I teach in the area of -- I actually have four (4) courses I teach there. I teach a course on health promotion, a course on healthy public policy, a course on healthy cities and a course on health futurism. And at the University of Toronto, my position is an adjunct position so it means that from time to time I get called in. I used to give the -- the public health lecture in the introductory course on Canada's Health Care system, participated in seminars, that sort of thing.

Q- Well, indeed, Doctor, at the beginning of your résumé, you refer to yourself as a practitioner for public health. What do you mean by that?

A- That really since nineteen seventy-eight (1978), I've been working in the field of public health almost entirely at the local level involved in the practice, the development of policy and programs, health planning, development and implementation of programs, community development.

Q- Is public health a specialty within the medical field?

A- Community medicine is a recognized specialty of the Royal College.

Q- All right; and I note also at the bottom of your shorter c.v., just to go back to it finally, that you are -- or actually the top of page two (2), that you are presently

the co-chair of the program committee for the nineteen  
ninety (1990) Canadian Public Health Association  
Conference which is being planned. Can you assist us  
with an understanding of the role that the Canadian  
Public Health Association plays in our society?

A- Well, the Canadian Public Health Association is a  
voluntary association, a multi-disciplinary,  
multi-professional association of public health and the  
members of the general public for that matter, but  
primarily public health professionals. It plays  
primarily an educational and advocacy role, I would say,  
and it's, if you like, it's in a sense more like a  
public interest group for the public health but with a  
very strong professional component.

Q- How different are the objectives of the Imperial Public  
Health Association for which you were President for a  
period of a year or two (2)?

A- Oh, they're the same.

Q- All right. Are you a member or are you affiliated with  
the American Public Health Association?

A- Well, I'm not affiliated as such but I actually received  
a phone call, I guess it was last week, from the  
executive director because they want to nominate me as a  
vice-president of the association. There's one (1)  
position on that association which is for a Canadian --

one (1) Canadian vice-president.

Q- Thank you. At page four (4) of your c.v. you -- under  
the topic: "Areas of Interest," one that isn't  
self-evident in its definition is you cite an interest  
5 in health futurism. What does that mean?

A- Well, futurism is really the study of the future and the  
study of thinking about the future. So health futurism  
is a -- if you like, is an area...

THE COURT:

10 Is a what?

A- I'm sorry.

Q- Health future is a what?

A- Health futurism.

Me EVRAIRE:

15 Futurism.

THE COURT:

Q- Yes, I know, is a what?

A- It's the study of the future and it's the study of  
thinking about the future. So it's concerned with  
20 future directions in society in general and in the case  
of health futurism, it's concerned with future  
directions in health, future issues in health, those  
sorts of things.

Me EVRAIRE:

25 And there follows in your c.v. a number of publications

or articles you have authored or co-authored as well as presentations you have made. I have questions just about one of those at page five (5).

Now, you wrote under articles in refereed journals in nineteen eighty-six (1986), for the Journal of Health Promotion, an article entitled: "Lalonde and Beyond: Looking Back at a New Prospective on the Health of Canadians."

Is that the Lalonde report about which we've heard some evidence here, Doctor. Is that the Lalonde report from Health and Welfare?

A- That's right.

Q- Right. What was the focus of that article which you wrote?

A- Well, it was really partly looking back at the Lalonde report and it's seminal role in the rethinking of public health and then looking at some of the developments that had occurred in the twelve (12) years, I guess it was at that point, since then. Looking at the development of the new notion of health promotion, healthy public policy, new developments of municipal public health in Toronto and so on. So it was really an update.

Q- And, finally, I gather from your c.v. that you are a private consultant now?

A- That's correct.

Q- Where do you focus your attention as a consultant?

A- Broadly in the area of what's known as health promotion or the new public health and in the area of healthy cities or healthy communities, which is a large international project now. The area of healthy public policy. Those are the general areas in which I work.

Q- Healthy cities sounds like a nice title, but could you give us a bit of meat to that. What exactly is your focus under that particular heading?

A- Well, I do consultation work with cities. I actually continue to work as I have -- ever since I went part-time as a consultant, I continued to work part-time for the City of Toronto.

Q- M'hm.

A- So it's a combination of -- let me go back a step. The healthy cities project is really about how do you make a whole city more healthy, which is a very broad public undertaking which comes out of the public health field. That project, and we started to think about that in Toronto in the early eighties (80s), that became picked up by the World Health Organization and has become a major program in Europe and has spread to Australia, back to Canada, to a national project here, down into the United States. My role is as a consultant to both the European project, the Canadian project, the various



cities and towns across Europe and North America, to work with them on how to develop the healthy city project and how to apply the new public health at the local level.

5 Q- Can you give us an example of the practical application of some of the principles you're dealing with on this project?

A- Well, for example, I was in Jerusalem a week ago on behalf of the World Health Organization and we --  
10 they're establishing a national network, an Israeli healthy cities network. So I spoke to and worked with people at their seminar to look at how do you develop a national network, what are some of the issues involved, what are some of the basic principles of the project.  
15 Then I spent a day with the Jerusalem healthy city project staff looking at ways of applying the healthy city project in Jerusalem, so we got into areas of the possibility of developing healthy neighbourhood projects, the possibility of getting into the area of  
20 recycling as an environmental initiative that has health implications and so on.

Q- Thank you, Doctor. My Lord...

THE COURT:

Are you filing his c.v.?

25



Me EVRAIRE:

I was just going to ask if we could mark that as the next AG exhibit?

THE GREFFIER:

5 191. AG-191.

CROSS-EXAMINATION BY Me EARL A. CHERNIAK

on behalf of Respondent, RJR-Macdonald Inc.

10 Q- Doctor, I'm just trying to understand some of the things that you told Mr. Evraire. Did I understand you to say that until you started thinking about it in nineteen eighty (1980), nobody started -- nobody thought about having healthy cities before?

15 A- Oh, I wouldn't say nobody ever thought of it before, certainly not. The notion is as old as history, I suppose, and certainly one of my own inspirations is ...

20 Q- I just wanted to know whether anybody ever thought about it before nineteen eighty (1980), until you started spreading it to Australia and back to Canada. People did think about it before nineteen eighty (1980), did they?

A- Oh, certainly. Yes.

Q- Oh, I see. Okay. Just want to make sure.

25 I listened carefully to all the questions that Mr. Evraire asked you and I only heard the question of the

issue that we're dealing with here, of tobacco use, mentioned once. And that had to do with your work for the health advocacy unit of Toronto?

A- M'hm.

5 Q- And as I understand it, two (2) things that you mentioned that that unit was involved in was assisting in the preparation of by-laws to prohibit smoking in public places?

A- M'hm.

10 Q- Is that right?

A- Yes.

Q- And you were involved then in the assistance of municipalities in preparing these by-laws and the health advocacy unit was doing that; is that correct?

15 A- That's one of the things I was involved with with respect to that.

Q- Yes, well, I'm just -- listen, that was one of the things that you mentioned to Mr. Evraire.

20 And the second thing in that connection that you mentioned to Mr. Evraire was education in the schools. And I take it that was education about the -- about the dangers and the perils of tobacco use?

A- It was about that and about how to -- how to learn not to smoke, if you like, or how to resist the temptation.

25 Q- So that your group was involved in advocacy in the

schools, teaching students about the perils of smoking and how to resist smoking?

A- We were involved in education in the schools and advocacy with the school board.

5 Q- Well, it was education about the perils of smoking?

A- That's correct.

Q- Okay. And that was what your group was doing and your role in that was what? Supervisory? Going to the schools and preaching against tobacco use -- what was your role?

10 A- No, I didn't do that. I was involved in, as the health planner in working on the development of the program. So...

Q- So you were involved in the development of a program to disseminate information in the schools about the perils of tobacco and in restrictions and assisting in restricting tobacco use?

A- That's right.

Q- Is that a fair summary of what you were doing?

20 A- That's a fair summary of some of what I was doing.

Q- Well, I don't mean that that took up your full-time duties for the health advocacy, and the health advocacy unit was involved in a whole bunch of other things dealing with pollution and the environment and things like that.

25

A- That's right.

Q- Yes. Now, I'm interested at this point in your qualifications with respect to certain aspects of the things that you talked about in your report. And if you would turn to page thirty-six (36) of your report, it's this opinion that I want to know the expertise from which you purport to speak?

A- M'hm.

Q- And you'll see six point one (6.1) where you talk about the central point of the Tobacco Products Control Act. In your view it is intended to prevent the tobacco product advertising and promotion on the grounds that it's an inducement to use tobacco. And in view of the fact that it is stated in section three (3) to be a national public health problem of substantial and pressing concern.

And you say this:

"From the public health perspective, given that smoking is a major health hazard, the issue is whether or not tobacco advertising and the promotion is an inducement to smoke."

That's issue one (1).

"Whether or not banning tobacco promotion as a means of reducing smoking..."

That's issue two (2).

"And whether such a ban is socially and politically acceptable..."

And that's issue three (3).

And I want to deal with the background that you have to purport to give an opinion on those matters.

Now, I read your c.v., it's a very long c.v., very carefully, and the only mention that I could find anywhere in the c.v., in your books, in your chapters, in your seminars, in your articles, in whether refereed or non-refereed is one mention of something to do with keeping tobacco out of the work place.

Now, am I wrong, is there some other paper or study that you've done that deals with the use of tobacco and the initiation of tobacco or anything to do with...

A- Which paper are you looking at?

Q- The one that I found. Just to see if I can pick that one up. Yes, at page ten (10). In nineteen eighty-five (1985) you conducted a workshop on secondhand smoke in the work place, the municipal role.

A- M'hm.

Q- Ontario Public Health Association.

Now, I may be wrong, and you can point out to me if you like, but is there any place else in that whole lengthy list of everything you've done in which you have prepared a paper or given a talk where the focus was the

use of tobacco or its -- or anything to do with the use of tobacco?

A- Probably not with that specific title, but with a number of the work and most of the work that I have done has touched in one way or another on tobacco.

Q- Touched in one way or another?

A- Yes.

Q- Yes.

A- For example...

Q- And specifically...

Me EVRAIRE:

Let him finish, please.

A- For example, the healthy cities project, one of the things that we look at and one of the things we're interested in is the way in which a city is addressing the tobacco issue.

Me CHERNIAK:

Q- Yes. So...

A- So that you can't really talk about a healthy city project without talking about dealing with the tobacco issue.

Q- So what you do is you talk about, for instance, how cities or countries or municipalities deal with tobacco in terms of their by-laws?

A- Precisely.

Q- Yes. Right. Now, have you ever engaged in any research into, say, the addiction issue with respect to tobacco?

A- No.

Q- Have you ever done any clinical work with respect to addiction?

A- Well, certainly, as a family physician, I saw lots of cases of people who had disease because of tobacco.

Q- Okay. And have you ever had any training with respect to the uses and -- and usefulness of advertising? Have you done anything in the advertising field?

A- No, I haven't.

Q- And have you ever made any -- any studies with respect to the basis or the mechanisms that involved people in the use of tobacco products, initiation of the use of tobacco products, has that been a field of study in which you've been involved?

A- Well, certainly as part of the analysis of Health Science program we dealt with, among other issues, the way behaviour is shaped and that deals with the tobacco issue among others.

Q- So -- so what you're saying is that you took a course in the behaviour?

A- Yes, in fact, two (2) or three (3) courses.

Q- And -- but you have done no research yourself in the field of determining how or why, in what circumstances



people begin the use of tobacco?

A- No.

Q- And would it be fair to say that you have done no review of the literature in Canada or elsewhere with respect to the issue as to under what circumstances and for what reasons people -- and when I say people, I include young people, initiate the use of tobacco?

A- Well, certainly if you look at my report, I referenced the Toxic Substances Board report for New Zealand which was a recent review of a lot of that area.

Q- All right, so you mention one (1) thing, you've read the recent Toxic Substances Board report. I suppose anybody can read that. That came out in nineteen eighty-nine (1989) so you've read that?

A- That's right.

Q- And does that constitute the review of the literature that you have done with respect to the initiation of smoking behaviour?

A- Not over the years, no. I've read a number of other articles.

Q- But you -- can you name one (1) of them now?

A- Not offhand.

Q- Is it fair to say that you did no such research for the purposes of this report?

A- I read the Toxic Substances Board report.



Q- Other than that?

A- No.

Q- For instance, we had a witness come here on behalf of  
the federal government who has done, in Canada, over a  
number of years, research into why young people,  
students, public school and high school students  
initiate tobacco use. Are you familiar with any such  
research?

A- Which witness are you referring to?

Q- Well, I'm not going to tell you that for the moment. I  
want to know whether you are even aware of the name of  
the government witness who came here and told us about  
the scholarly work that he's done in this area? Have  
you ever heard of such a person in Canada?

A- I don't know which particular government person you have  
in mind.

Q- All right. It's not a government person, it's a witness  
called by the government?

A- M'hm.

Q- Have you heard the name Neville Lefcoe?

A- Yes, I have.

Q- Yes. Have you read any of his work?

A- Yes, I have.

Q- And have you any idea of the work that he did with  
respect to smoking initiation among public school

children and -- and teenagers?

A- Which particular work are you referring to?

Q- No, no, no, I'm asking you whether you've heard of it?

Have you read it, have you heard of it?

5 A- I've read it.

Q- Can you tell us anything about it today?

A- Not offhand today. I'd have to see what it was he wrote  
and take a look at it.

10 Q- But for the purposes of coming to the opinions that you  
did in answering the questions on page thirty-six (36),  
you did no such work?

A- I reviewed the Toxic Substances Board report.

Q- Other than that?

A- Other than that.

15 Q- Yes, and of course the Toxic Substances Board report  
came out just about the same time as you prepared this  
report?

A- That's correct.

20 Q- So when you say the answer to all three (3) questions  
that I posed to you -- or that I read to you from your  
own report is, yes, the -- with respect to the first  
question, the issue is whether or not tobacco  
advertising and promotion is an inducement to smoke.  
Other than reading the Toxic Substances Board report,  
25 you simply have done no research with respect to that

issue whatsoever, have you?

A- No, that's not correct.

Q- All right, so let's break it down. For the purposes of this report, you did no such research -- no other research other than the reading of the Toxic Substances Board report?

A- That's right.

Q- And you didn't -- yes, am I right?

A- I said that's correct, yes.

Q- And you didn't refer to any other such research in your report?

A- No.

Q- And you have had no training in the determination of what induces people to smoke and whether advertising does? That's not something that you've ever studied?

A- That's not correct. I studied that as part of my Masters of Health Science program.

Q- You studied that, what do you mean that?

A- That was part of the curriculum. It was part of the course in health...

Q- What do you mean that was? What was part of the curriculum?

A- The determinants of smoking behaviour.

Q- The determinants of smoking behaviour. Well, I must have missed something. I haven't seen anything in here

that tells us about what the determinants of smoking  
behaviour are? You've simply made the statement that  
the issue is that tobacco advertising and their  
promotion is one and you've answered it yes, you did no  
analysis of that?

A- I read the Toxic Substances Board report.

Q- Yes, and you say that you took a course in your masters  
program?

A- That's correct.

Q- And you've never written on that issue?

A- No, not specifically.

Q- And you've never done any clinical work in that issue  
other than being a family practitioner?

A- That's correct.

Q- Yes; and then the next issue is whether or not banning a  
tobacco promotion is a means of reducing smoking. Would  
it be fair to say that you have undergone no course of  
study with respect to that issue either?

A- I'm just trying to recall whether that was specifically  
touched on. I would say it was part of the course in  
terms of the study that I did twelve (12) years ago,  
but...

Q- Would you say that...

A- As part of my Masters in Health Science.

Q- ... whether or not banning tobacco promotion is a means

of reducing smoking, that was part of your course twelve (12) years ago, part of some course at the University of Toronto?

A- That's right.

5 Q- Can you refer to one (1) textbook on it, one (1) article on it, anything?

A- Well, I'd say the most recent thing I've read is the Toxic Substances Board report again which deals with that issue.

10 Q- In fact, it's about the only thing you can remember that you've read on the issue, isn't it?

A- It's the only thing I've read recently.

Q- Name one other -- name one other publication on that issue.

15 A- Um -- I can't give you the exact reference of this date, but, for example...

Q- No, give us the general area.

A- Okay.

20 Q- Do the best you can. Let's see what you -- after all, this is a major part of your report.

6/0049 A- M'hm.

Q- You've read the New Zealand Toxic Substances Board which came out in the spring of nineteen eighty-nine (1989)...

A- Okay.

25 Q- ... or the summer of nineteen eighty-nine (1989). Name

one other reference on that issue.

5 A- Various textbooks in public health, and I've cited three  
(3) of those at least in my report here. John Last's  
textbook on Maxcy-Rosenau certainly addresses the issue  
of tobacco advertising and smoking, as does the Oxford  
textbook of public health, and there is no question that  
in there, there is a strong opinion that advertising is  
an inducement to smoke.

10 Q- So you say there are some textbooks. Of course, you  
haven't made any reference to them on that issue and  
you've done no research in that area? Am I correct?

A- I haven't referenced them in that particular instance.

Q- And you've done no research in that area?

A- I've done no research.

15 Q- And apart from some vague reference in some course that  
you took twelve (12) years ago, you've had no training  
in that area?

A- That's right.

20 Q- Yes. So really what you've done with respect to the  
first two (2) issues is simply relied on what the Toxic  
-- what the New Zealand government's Toxic Substances  
Board said?

25 A- No, I've also relied on my experience as a public health  
practitioner and I've relied on my readings over the  
years in the area of public health.

Q- Yes. None of which you refer to, except for the New Zealand Toxic?

A- I actually referred you just now to both the Oxford textbook of public health and the Maxcy-Rosenau textbook of public health.

Q- In your report?

A- They're referenced in my report, not specifically with reference to that aspect, but they're part of my reference material.

Q- And then the third issue that is under that -- under the -- what you call "the central point about the Tobacco Products Control Act" is your -- an issue that you state is whether such a ban is socially and politically acceptable. Now, would it be fair to say that what is socially and politically acceptable is something that every citizen can and does have opinions about?

A- I'm sure every citizen has opinions, yes.

Q- Yes. And you don't -- you don't purport to say that your opinion on what is socially and politically acceptable is any better or any worse than anybody else's, do you?

A- The point about my opinion is that it is widely informed by a practice of public health over the last twelve (12) years.

Q- Well, what you say about that though, is that you



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conclude that it is socially acceptable because of opinion polls and because the government passed the legislation.

A- That's correct.

5 Q- That's what you say.

A- M'hm.

Q- And where is it that you talk about this being something to do with your own expertise in the area? I'm looking at page thirty-seven (37) of the report. You don't mention anything else, other than the opinion polls and the passage of the Act. It's all you say.

10 A- If I can just find another passage in there that I'm looking for -- the point about this is that the process of public health decision making, as I've referred to elsewhere on page twenty-six (26), is a matter of science, art and politics.

15 Q- Yes, I'm going to come to that.

A- And that therefore the decision about -- about public health takes into account both what is socially and politically acceptable.

20 Q- So let's just get back to my question.

A- M'hm.

Q- The only reference that you make to the back-up for your opinion on the third issue, whether it's socially and politically acceptable, is first of all that the

25



government has passed the Act...

A- I think that...

Q- ... therefore it must be politically acceptable,  
otherwise...

5 A- Yes.

Q- ... why would the government pass the Act?

A- I agree.

Q- And that you -- you say that there are opinion polls.  
Of course, you didn't do these opinion polls.

10 A- No, I didn't do them.

Q- Yes. You seem to think that, depending on which poll  
you read, that some people think that tobacco  
advertising ought to be banned.

A- That's correct.

15 Q- Yes, but you didn't give us the benefit of indicating  
what exactly it was that people were asked in those  
polls, so that we can evaluate them, did you?

A- I can certainly give you that, if you want it.

Q- Oh, you could, yes, but you didn't?

20 A- No, I didn't.

Q- And then what you said on page twenty-six (26) --  
because I do want to come to that -- is that you have  
said that -- that public health is in part science, in  
part art, in part politics.

25 A- M'hm.

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Q- Is that right?

A- That's correct.

Q- And with respect to the science part of your opinion,  
the only science that you have referred to is a back-up  
5 for your opinion -- the research that you did is the  
report of the New Zealand Toxic Substances Board,  
correct?

A- Correct.

Q- In this report? Yes? So the rest of what you're  
10 telling us is a combination of art and politics, isn't  
it?

A- Yes, I'd say so.

Q- That's really what your opinion is based on, the New  
Zealand Toxic Substances Board and your view of the art  
15 and politics of public health. That's what it comes  
down to, isn't it?

A- In part. The science that you're referring to is a  
rather narrow piece of the overall picture because the  
real scientific issue at the nub of this is whether or  
20 not tobacco causes death and disease, and given that it  
does, then the issue becomes not so much a matter of --  
of the science of whether it causes death or disease but  
what can one do to prevent it. And that is where, if  
you like, the art and the politics and a reasonable  
25 scientific basis for belief comes in.

So that -- but the whole point about public health -- and I'd refer you to the Ontario Health Protection Promotion Act -- is that public health officials, medical officers of health specifically, act on the basis of having reasonable and probable grounds to believe. So that's the basis for decision making and it's at that point that it becomes a combination of science, art and politics.

5  
10 Q- Yes. Well, you've made it very clear in your report that from your perspective tobacco use in its entirety should be banned from the face of the earth?

A- What I said was that on the basis of the scientific evidence, what we should do is ban it tomorrow, yes.

Q- Is that...

15 A- Or today, in fact.

Q- For whatever reason, what you've said is in your view it should be banned from the face of the earth?

A- No, I didn't say that. I said that if it was just on the basis of science, we would ban it tomorrow. What I also said was that the social and political realities are such that you can't do that and, in fact, that would not be good public health. So no, it's not my opinion it should be banned tomorrow.

20  
25 Q- And it wouldn't be good public health because people would still smoke, notwithstanding the ban?

5 A- It wouldn't be good public health because it would not be socially and politically acceptable to ban tobacco. However, it appears that it would be socially and politically acceptable to ban the advertising of tobacco.

10 Q- So what you've done in this report is to justify the tobacco ban because -- because it's one step -- or at least the tobacco advertising ban, because whether it works or not, it will send a message. That's in effect what you've said, isn't it?

A- It would both send a message and it would also change the social environment within which decisions about smoking take place.

15 Q- And that's, in fact, what you're advocating in your report?

20 A- I'm not advocating. What I'm saying is that the scientific position, and for that matter the position of public health associations, has been that tobacco advertising should be banned, that ultimately tobacco use should be eliminated.

25 Q- Because that's what you advocate? You've done no research yourself? You have no better opinion than anyone else, from the point of view of your training, as to the extent to which, if at all, a tobacco advertising ban will effect consumption. You've taken that from

others, haven't you?

A- Yes.

Q- Yes. So you've got no expertise in that area yourself?

A- No.

5 Q- Right. And you have done no research yourself on the extent to which, if at all, tobacco causes disease. You've left that to others too, haven't you?

A- That's the nature of public health to a fair extent.

Q- I'm not knocking you. Nobody can do everything.

10 A- No. Exactly.

Q- You've left the issue as to whether tobacco is or is not a dangerous substance, disease-causing substance, to others and you've simply accepted the expert opinions of others in that regard?

15 A- Yes, I'm persuaded by their evidence.

Q- And so that what you've done is taken those two (2) -- taken those expert opinions of others and said that there should be a ban on tobacco, but that's not socially and politically acceptable and therefore we should ban advertising to create a social climate?

20

A- No, I haven't said there should be a ban on tobacco.

Q- Tobacco advertising, I said.

A- No, you didn't. You said tobacco.

Q- Well...

25 A- And I -- you said that I was saying that there should be

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a ban on tobacco and that's not what I said. What I said was that if one were to base it solely upon the scientific evidence of the harm that tobacco causes, one would have to conclude that tobacco use should be banned. However, that's not feasible, so I'm not advocating it.

Q- Well, you do say this -- this is at page thirty-three (33):

"While the only legitimate scientific public health response to tobacco is a total ban in production or consumption, prevailing social and political realities do not make such a step feasible at present."

A- That's right.

Q- And that's your view, isn't it?

A- My view is that such -- that is not feasible, that's right.

THE COURT:

What page?

Me CHERNIAK:

That's at page thirty-three (33), My Lord.

A- What I'm saying there is that if public health and decisions about public health were based solely on scientific evidence, we would ban tobacco use tomorrow, but in fact, that's not the sole basis for decision

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making in public health.

Q- But the point is, what I'm trying to find out is what you're coming here with your expertise to tell us. You've used the expertise of others with respect to the things that we've talked about, and what you are purporting to do is to give us the benefit of your views on what is socially and politically acceptable to achieve the end result of a smoke-free society.

A- No, what I'm talking about is the application of the principles of public health to decision making about public health, specifically in this instance to decision making about tobacco and even more specifically to decision making about advertising.

Q- In order to achieve the social and political ends that you're talking about.

A- In order to improve the health of the public.

Q- Well, we've already dealt with the proposition that you simply don't know from your own expertise and training whether a tobacco advertising ban will or will not reduce smoking. You just don't know that. You've accepted the views of others on that issue.

A- What I have said is that as a public health professional I would have reasonable and probable grounds to believe that that might indeed contribute to a reduction in smoking.



Q- Now, what I'm wondering is, is this based on -- are your views on tobacco advertising based on the evidence that you have read or is it based on some predetermined antipathy to, or at least existing antipathy, to tobacco -- to the tobacco industry?

A- No, I'd say that my views on tobacco are the result of having been trained in medicine, having seen the effects of tobacco smoking on people. I gave up smoking tobacco myself after my first winter on the wards watching chronic bronchitics slowly die, and its not a pretty sight. And that was confirmed as I continued to see the health effects of smoking. I then studied the health effects of smoking as part of my public health program, and came to the conclusion that this was a major public health problem and that it should be prevented. Which is a reasonable public health position.

Q- Well, I wonder whether we can just get back to my question. Have you -- did you develop an antipathy to -- did you do this report and deal with the tobacco advertising on the basis of a, sort of, an intellectually rigorous examination of the -- of the problem, or did you do it on the basis of some deep-seated and long felt antipathy to the tobacco industry?

A- I did it on the basis of the fact that tobacco is, and



many others have said this, the major preventable cause of death and disease in this country, and therefore have seen that as part of my job as a public health practitioner to do everything that I can to reduce the toll that tobacco takes.

Q- So then I take it that you're telling me that you don't have any particular antipathy to the tobacco industry, you're simply an objective, fair-minded...

A- I have strong views, but I don't have an antipathy as such.

Q- I see. Are you a member of any of the anti-smoking organizations?

A- Yes, I'm a member of the Non-Smokers Rights Association.

Q- Yes. And how long have you been a member of the Non-Smokers Rights Association?

A- I would say about five (5) or six (6) years probably.

Q- And are you active in that organization?

A- No, I'm not. I hold a membership.

Q- Have you said that there is a -- do you believe that there is a deliberate campaign by the tobacco industry to kill and disable millions of women?

A- Can I see what you're referring to?

Q- Did you say that -- have you said that?

A- Until I see what you're referring to, I have no idea.

Q- I'm showing you an article published in the year

nineteen eighty-seven (1987) in a publication called:  
"Health Care for Women International."

A- M'hm.

Q- Which is a -- has either a chapter or an article, I'm  
5 not sure whether it was a book or what it was, by Trevor  
Hancock.

A- It was a speech.

Q- Is that you?

A- That's me, yes. It was a speech I gave to the...

10 Q- It was a speech you gave. And...

A- At the banquet.

Q- I take it it was a -- whatever you said, you truly  
believe.

A- I would think so.

15 Q- Yes. And you were speaking to whom?

A- This was the Second International Congress on Women's  
Health Issues.

Q- And you were speaking, in effect, to a group of women  
about women's health matters?

20 A- That's right.

Q- Would you turn to page two fifty-three (253)?

A- Certainly.

Q- And you were dealing with, just before, the paragraph on  
page two fifty-three (253), with smoking and women's  
25 health.

A- M'hm.

Q- Yes? Am I correct?

A- Yes.

Q- If we look at the previous page, you were dealing with  
5 smoking and women's health?

A- Yes, we were addressing the epidemic of lung cancer  
resulting from smoking in women.

Q- And you say this:

10 "The women's movement has been curiously  
silent about this issue. I find this  
incomprehensible because -- particularly  
because the tobacco companies have quite  
cynically linked smoking to the emancipation  
of women."

15 A- Yes.

Q- "I'm sure everyone here is familiar with the  
notorious: "You've Come a Long Way Baby!"  
advertisements of one company that portray  
women at the turn of the century being  
20 chastised and belittled for smoking and  
contrast that with the attractive, asserting  
smoking women of the 1980s."

I take it that's the Virginia Slims advertisement that  
you're speaking of?

25 A- That's right.

Q- "In my view, this is no less than a deliberate campaign by the predominantly male dominated tobacco industry to kill and disable millions of women."

5 Did you write that?

A- I did.

Q- Did you believe it then?

A- I believe that they are ...

10 Q- Did you believe it then? Did you believe what you wrote then?

A- What I wrote and what I believe is that the tobacco industry is deliberately marketing cigarettes to women and that the consequence of that will be to kill and disable them, and since the tobacco industry is well aware that tobacco smoking causes death and disease, one can only assume that they are doing so in the full knowledge of that, yes.

15 Q- Well, no, no, but that's not what you said. That's not what you said. What you said was:

20 "... this is a deliberate campaign by the predominantly male dominated tobacco industry to kill and disable millions of women."

You didn't put any qualifiers or intermediate steps in there. You said that it was a deliberate campaign by the tobacco companies to kill and disable millions of

25

women.

Now, did you believe that?

A- I believe that the deliberate campaign they're mounting will kill and disable millions of women, yes.

5 Q- No, no, no, but that's not what you said again. Can't you accept what you said and tell me whether you believed it. Maybe you didn't believe it.

A- No, I believe it. I believe that the tobacco industry, because of its actions, is going to kill millions of  
10 women.

Q- No, no, but that's -- but that's a different thing than saying that they're deliberately setting out in a conspiracy, a male dominated conspiracy, to kill women. That's what you believed, isn't it?

15 A- I'd say that's the effect of what they're doing.

Q- That's not what you said though, is it? It's not what you said. What you said was that there was a deliberate campaign, conspiracy...

A- I didn't say conspiracy.

20 Me POTTER:

Campaign.

Me CHERNIAK:

Q- I'm sorry. Campaign. I beg your pardon. Campaign by the predominantly male dominated tobacco industry to  
25 kill and disable millions of women -- not that they were

doing something innocently which would have that effect,  
but that there was a deliberate campaign to do it.

A- No, they're certainly not -- they're certainly not doing  
it innocently, because they cannot possibly claim,  
reasonably, that tobacco smoking does not kill.

Q- Just try -- we're just trying to find out where you're  
coming from, sir. Whether you are an objective,  
intellectually...

A- I understand, and I'm trying my best to explain where  
I'm coming from.

Q- I'm just trying to determine whether you are what you  
have been -- what you have been portrayed to be in your  
report, in your c.v., an intellectually, rigorous  
academic expert who's coming to assist us in this matter  
or whether you come here as an advocate, a -- with  
preformed opinions about this issue.

A- No, I come here as a practitioner of public health to  
talk about the application of public health principles.

Q- Yes. But when you wrote your report and when you wrote  
the part of it, six point two (6.2) that I read you  
earlier, you were doing so, I take it, sir, from the  
perspective that you expressed in nineteen eighty-seven  
(1987) in this speech, that the tobacco industry that  
you were writing about in that section had engaged in a  
deliberate campaign to kill and disable millions of

women. That was -- have you changed your view between nineteen eighty-seven (1987) and nineteen eighty-nine (1989)?

5 A- No, I believe that is the effect of what they're doing. That they are deliberately trying to promote women and encouraging them to smoke and that in so doing they will kill millions of them. And I think that that is not acceptable.

10 Q- Yes. And that's in effect the political perspective from which you speak?

A- That's the public health perspective from which I speak.

15 Q- Yes. And you describe it as a complete obscenity. In other words, the advertising by the tobacco industry, in your view, in nineteen eighty-seven (1987) and today, is that it is a complete obscenity.

A- Once you have accepted...

Q- Is that true, sir? Is that what you meant to say?

20 A- Once you've accepted the evidence of what tobacco smoking does to people and the numbers of people it kills, then to continue -- for the tobacco companies to continue to promote their product in the full knowledge that it does that, I consider that an obscenity.

THE COURT:

25 So the answer is yes?



THE GREFFIER:

Say yes.

A- Yes.

Me CHERNIAK:

5 Q- And I take it that you have an objective which is to --  
which is to, in effect, create a society that is based  
on certain principles with respect to public health, is  
that right?

10 A- If you're referring to an article, perhaps I could see  
it?

Q- No, no, I'm just asking you whether you have a political  
objective or not in respect to public health?

15 A- No, I don't have a political objective with respect to  
public health. I think public health is about politics  
as I made very clear in my report.

20 Q- Well, is it your belief that people must be protected  
from themselves because they can't, because in the  
social environment in which live they are -- they simply  
can't protect themselves from influences like alcohol  
and tobacco?

A- I don't think, I mean, are you quoting something  
specifically because it's not...

Q- I'm asking you -- I'm just asking you questions, sir.

25 A- I realize that. Do I think people should be protected  
from themselves? No, I don't think it's that. I think



that people need protection from those who would exploit them.

Q- Yes, and those who exploit them, in your view, are people who sell things that result in what you call lifestyle diseases? Have you used that term, lifestyle diseases?

A- That's right.

Q- And would the effects of smoking be a lifestyle disease in your view?

A- Depends on how you're defining a lifestyle disease. It is in some -- it is a lifestyle disease but it's influenced by a complex of social and environmental factors as well.

Q- And...

A- So the notion -- one (1) -- one (1) of the points in my report is that the notion of lifestyle in public health is a complex one, that it doesn't simply imply individual behaviour.

Q- And that's -- and the use of alcohol falls in the same category? It's a lifestyle disease?

A- The use of alcohol itself is not a disease but the health consequences of the use of alcohol or the excessive use of alcohol is a problem.

Q- And do you believe that the environment in which we live now, the social environment which we live now has, in

effect, expropriated people from their inherent self-reliance?

5 A- There are certain ways in which it has, yes, which is precisely why another of the important principles of public health is a community development approach to empower people to take back some of the power.

Q- And do you believe that the public health has a mission?

A- Yes.

Q- And what do you believe is the mission of public health?

10 A- Well, I guess the simplest way to put it is that the mission of public health is to work to create the greatest health for the greatest number.

15 Q- Well, let me suggest to you that -- that you think that the mission of public health is to create a certain kind of society?

A- The mission of public health is to create a more healthy society, if you like, yes.

20 Q- Well, if I suggested to you that you believe that it's to create a sane, humane and ecological society, would that be -- that be fair?

A- That's a phrase that you're quoting from an article of mine, I presume. The phrase is with reference to James Robertson's notion of a sane, humane and ecological society, yes.

25 Q- Well, let's look at what you said.

THE COURT:

Before you move to another one, are you going to give a number?

Me CHERNIAK:

5 Oh, I'm sorry, yes. Let's make that the next RJR exhibit.

THE COURT:

Cent soixante-neuf (169).

Me EVRAIRE:

10 Mr. Cherniak, do you have an extra copy of that?

Me CHERNIAK:

Sorry, I don't.

Me EVRAIRE:

Okay.

15 Me CHERNIAK:

Q- This is an editorial that you wrote in the Canadian Journal of Public Health in May of nineteen eighty-two (1982)?

A- Yes.

20 Q- And you're talking on the first page in the middle paragraph about man-made threats to public health. I take it...

A- Sorry, where is that?

Q- In the middle paragraph.

25 A- Of which column?

Q- I'm sorry, in the middle column, about halfway down the page, you say:

"There can be no question that most of the threats to health in Canada today are man-made."

A- M'hm.

Q- And I take it that use of alcohol and use of tobacco would be among the threats to health in Canada that are man-made?

A- Yes, I think that's a reflection of what the Lalonde report was saying.

Q- And then you say, at the bottom of that column:

"These relationships have led us to place profit before people and to expropriate from people their inherent self-reliance and power."

Did you write that?

A- These relationships, I'm sorry, yes, I did but which relationships was I referring to?

Q- You say:

"Much more ill health is due to the dominating and exploitive relationships that exist between some groups of humans and their fellows."

A- Yes.

Q- Yes. And I take it you would include in that the relationships between those who advertise these man-made products and manufacture them and the people who consume them, that's what you're talking about, isn't it?

5 A- That's part of what I'm talking about.

Q- Yes.

A- I'm talking about a number of things in that paragraph where I talk about a number of different relationships. Much ill health is due to the dominating exploitive relationships that exist between humans and nature. So I'm talking there about the relationships between humans and nature, the way we treat the planet, the sort of problems we have right now with the ozone layer and so on. So that's one (1) aspect of the sorts of relationships that have led to problems, and another aspect...

10

15

Q- Sir, I didn't ask you for a speech, I just asked you whether that was...

A- I know and I'm...

20 Q- ... what you were talking about?

A- I'm answering your question. Much more ill health is due to the dominating exploitive relationships that exist between some groups of humans and their fellows, whether it be at the local or the international level. Therefore, there is a clear -- what I'm talking about

25

there is that the ways in which people relate to each other and in particular the ways that power within a society is distributed has an effect upon health, yes.

5 Q- So then, you go on to say about halfway down the right-hand column.

A- M'hm.

Q- You go on to say:

10 "It is therefore fallacious to consider lifestyle diseases as diseases of choice. Our choice of lifestyles is greatly influenced and limited by the social and political environment in which we live and the social and institutional structures we have created."

A- Yes, that's correct.

15 Q- Yes, and you believe that?

A- That is a basic principle of public health, if you like, yes.

20 Q- So that when -- it's simply wrong to say that people that suffer from diseases caused by excessive use of alcohol have anything to do with choice? Is that what you're saying?

A- What I'm saying is that...

25 Q- Is that what you mean, sir? I just want to know whether that's what you mean?

Me EVRAIRE:

He is answering the question, Mr. Cherniak.

Me CHERNIAK:

Q- To take a concrete example, is that what you mean, a  
5 person...

A- Yes, I understand what you're asking me and I'm  
attempting to answer it.

Q- Well, it's a simple question. Do you mean that or not?

A- No, it's not a simple question. Public health is not a  
10 simple matter. It's a very complex matter and in this  
instance what I'm referring to is that it is fallacious  
to consider lifestyle diseases as diseases of choice.  
The argument that has been advanced, you see, is that we  
simply choose and I reference, in fact, Labonté and  
15 Penfold's article there because the point they were  
making in their article is that it's ridiculous to  
imagine that people choose to be unhealthy. That you  
don't sort of consciously go out and say well, today I'm  
going to go get lung cancer and today I'm going to go  
20 and get myself polluted. So people don't simply choose  
their level of illness. They are -- their lifestyle is  
a product of their social and environmental and cultural  
and for that matter, family backgrounds and therefore,  
when you're looking at so-called diseases of choice, or  
25 lifestyle diseases, they are not simply a matter of



personal choice. They are the result of personal choice within the context of the social and political environments in which we live. So therefore...

Q- And therefore...

5 A- Therefore our choice, as I say there, is greatly influenced and limited by the social and political environment in which we live.

Q- And therefore...

10 A- So, it's not to say we don't have choice but it is to say that that choice is constrained.

Q- And therefore the mission of public health is to change that social and political environment, isn't it?

A- The mission of public health has always been to do that, yes.

15 Q- I just want to understand what you say the mission is and you say as much on the next page in the left-hand column, about halfway down. You say:

"The mission of public health then could be said to be the creation of a sane, humane and ecological society based on the principles of ecological sanity and social justice."

20 That's your view of the public health, right?

A- That's right.

25 Q- And if we just look up to the next paragraph, the paragraph just above it, about halfway down that



paragraph, you say:

"In this way, you say, we protect the individual from the impact of our culture upon and through the man-made environment."

5 A- M'hm.

Q- Yes? And then you say over to the right -- over to the center column, first paragraph:

10 "It is up to the local community health agencies to take up the fight on behalf of the health of their communities and to organize a coalition of health..."

A- Sorry, sorry, I can't -- where do you...

Q- Right-hand of the center column, first paragraph.

"It's up to..."

15 A- Yes.

Q- "...local community health agencies to take up the fight on behalf of the health of their communities and organize a coalition of health-mindful individuals and groups. A  
20 constituency for health to rival the present constituency for illness."

That's what you said, isn't it?

A- That's right.

Q- And that's what you do for a living? That's what you  
25 do, you are...

A- That's...

Q- ... involved in the fight?

A- Of course.

5 Q- In the coalition of health-minded -- health-mindful individuals and groups against the constituency for illness?

A- That is what public health...

Q- Are you part of that?

10 A- That is what public health has been about for hundreds of years and if you were to look at my report, you'll notice that I talk at some length about the fact that there have always been conflicts between economic activity and health. That they are not necessarily allies and if you were to go back to the Renaissance or  
15 back to the nineteenth century, you will find then what is true today, which is that, yes, indeed, there is a -- a fight, a struggle, if you like, between those who advocate for health and those whose actions will harm health.

20 Q- Dr. Hancock, don't misunderstand me. I'm not arguing with you. I'm not -- I'm not saying that's good or bad. It may be an excellent thing. I'm just trying to find out your perspective. The -- the -- what you do for a living, what approach you take to things. Is it true  
25 that you are, in effect, part of the coalition of

health-minded individuals and groups, the constituency for health to rival the constituency for illness?

A- Yes, that's what public health is.

Q- Yes. And you would put yourself on that side and you would put the tobacco and the liquor companies as part of the constituency for illness, right?

A- Yes, because the product of their activities, and particularly of the deliberate marketing of tobacco, is precisely to create illness.

Q- Right. So the point is that you are involved, as a part of your professional and daily life, in the fight against them, isn't that so?

A- That's part of what public health is about.

Q- Is that part of what you do, sir?

A- Of course, I...

Q- I don't care what public health is about, I'm trying to find out whether you are a part of the fight against that constituency.

A- But because public health is that and because I am part of public health, that is what I do.

Q- So. So the answer is: yes, I am part of that fight.

A- The answer is that I'm part of the public health fight against the causes of disease in our society.

Q- Thank you. And in effect...

A- And, if I could add, I wouldn't be doing my job as a

public health practitioner if I wasn't part of that fight.

Q- Precisely. And in effect you would describe what you do as part of the public health mission. Yes?

5 A- Yes. Mission is a...

Q- It's your word.

A- Yes.

Q- All right. And would it be fair...

A- Let me clarify ...

10 Q- It's your word, sir.

A- Yes. No, I know, but "mission" has many different meanings too and here I'm talking in the sense as a health planner of a mission statement, if you like, rather like the mission statement for the City of Toronto Department of Public Health is to help to make Toronto the healthiest city possible. That is our mission. So it's mission in that sense and not in the sense of a missionary. The word has several meanings.

15 Q- And do you agree, sir, that it is part of the agenda of the public health movement to eliminate tobacco and alcohol consumption?

20 A- I've never heard the public health agenda to eliminate alcohol but, yes, the Canadian Public Health Association, for example, has a position that it wishes to eliminate tobacco use.

25

Q- Well, but I want to know what your position is. Are you  
part -- do you think it is part of the public health  
agenda to eliminate both tobacco and alcohol consumption  
or either one of them? Is that part of the agenda of  
5 your movement, of your mission?

A- As I've already explained, on the basis of the  
scientific evidence one would have to conclude that  
tobacco use should ultimately be eliminated and,  
therefore, yes, the public health, for example, the  
10 Canadian Public Health Association, takes the position  
that tobacco use should ultimately be eliminated in our  
society.

Q- I want to ...

THE COURT:

15 Well, before you move to that, are you giving a number  
to the editorial?

Me CHERNIAK:

Oh, yes.

THE COURT:

20 And would it be appropriate to take an adjournment at  
this time?

Me CHERNIAK:

Sure.

THE COURT:

25 Or unless you're finishing the piece.

Me CHERNIAK:

Well, it's a very short passage from this article, but  
if I could just do that, sir.

THE GREFFIER:

5 RJR-170.

Me CHERNIAK:

Yes, let's make this one the next one. The next number.  
The editorial is ...

THE GREFFIER:

10 RJR-170.

Me CHERNIAK:

All right. And can we make RJR-171 the one I'm just  
giving you right now.

Q- And I'm showing you now, Dr. Hancock, another article in  
15 the Canadian Journal of Public Health from May/June  
nineteen eighty-five (1985), and in that article at the  
bottom of the first page there -- the very last  
paragraph on the first page, page nine (9):

20 "In England, medical reform and the public  
health revolution have been pursuing similar  
lines. In 1875 Sir Benjamin Ward-Richardson  
addressed the Social Science Congress. His  
topics: "Hygea, a City of Health," with a  
broad range of social and environmental causes  
25 of ill health."

And then you say:

"Many of the ideas that he advocated,  
including the elimination of tobacco and  
alcohol consumption, healthy work places,  
5 subway transit systems, community based group  
homes and other proposals to improve health  
are still on the agenda of public health  
professionals."

A- M'hm.

10 Q- Now, did you write that?

A- Yes, I did.

Q- Yes. And is it your view therefore, as a public -- you  
are one of those public health professionals, are you?

A- M'hm.

15 Q- Yes?

A- Yes. Right.

Q- And is it your view then that there is part of -- there  
is still part of the agenda of public health  
professionals to advocate the elimination of tobacco and  
20 alcohol consumption? Is that -- is that still your  
view?

A- My view -- no, my view is that it's the agenda to  
eliminate tobacco consumption. I don't think that  
public health has it on its agenda to eliminate alcohol  
25 consumption for a number of reasons, one of which is



that the evidence that any use of alcohol is dangerous is not there, in fact quite the reverse. But also that we tried -- or I don't think we tried, I don't think it was really a public health movement initiative, but that there was an attempt to prohibit alcohol use in the twenties (20s) which clearly didn't work.

Q- Well, sir, you wrote the -- you wrote those words, didn't you?

A- I wrote those words, yes.

Q- Yes. And why didn't you say then that the elimination of alcohol consumption was not on the public health agenda?

A- I think that what's on the public health agenda is the -- I would have to say reduction of alcohol consumption and, therefore, in a sense the issue of elimination is still on the agenda. But I would say the agenda has shifted since eighteen seventy-five (1875). You must recall that I was writing here about what Sir Benjamin Ward-Richardson advocated in eighteen seventy-five (1875). I think the agenda has shifted somewhat with respect to alcohol, because I don't think that that elimination is on the agenda any longer, but what is on the agenda still, and very clearly, is the reduction of alcohol consumption.

Q- So when you wrote:

"...many of the ideas that he advocated,  
including the elimination of tobacco and  
alcohol consumption are still on the agenda of  
public health professionals... "

5 -- you didn't mean that. Is that what you're telling  
us?

A- No, that's not what I'm telling you. What I'm saying is  
that his agenda was tobacco and alcohol consumption  
elimination and that those same sorts of issues are  
10 still on the agenda of public health professionals.

Q- Well, I must be having difficulty with the English  
language then, Dr. Hancock.

A- M'hm.

Q- Because you wrote that:

15 "...many of the ideas that he ..."

-- meaning Benjamin --

"... advocated are still on the agenda."

And you indicate which of those are still on the agenda.

It's probably a good time for a break, Your  
20 Lordship.

THE COURT:

We'll take a fifteen (15) minute break.

SHORT RECESS

25